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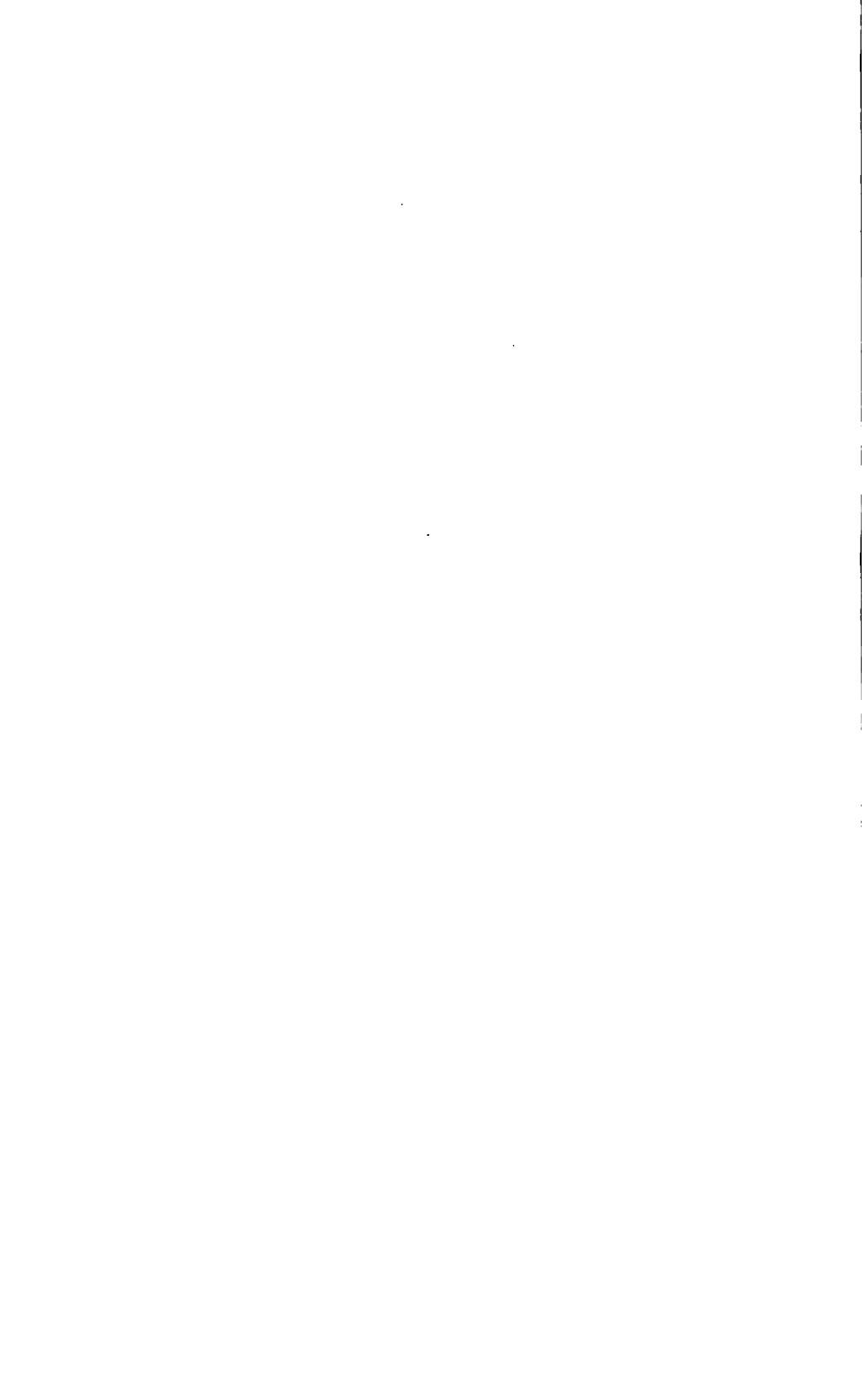
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REPORTS OF CASES

DETERMINED IN THE

JULY 5

SUPREME COURT

OF THE

STATE OF WASHINGTON

CONTAINING

**DECISIONS RENDERED FROM SEPTEMBER 16, 1902, TO
JANUARY 15, 1903, INCLUSIVE.**

EUGENE G. KREIDER
REPORTER.

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TABLE OF CASES REPORTED

	<i>Page.</i>
Adams v. National Bank of Commerce.....	20
Adams County v. Schroeder.....	703
Alden v. Campbell.....	392
American Bridge Co. of New York, Ralph v.....	500
American Copper, Brass & Iron Works v. Galland-Burke Brewing & Malting Co.....	178
American Surety Co. of New York, Drumheller v.....	530
Ames, Gladwin v.....	608
Anderson v. Harper	378
Anderson, State v.....	14
Anderson v. Wallace Lumber & Mfg. Co.....	147
Atherton v. Tacoma Railway & Power Co.....	395
Bachelor v. Bachelor.....	203
Bachelor v. Bachelor	639
Bell v. Spokane.....	508
Bergman v. Oudin	703
Bingham, Canadian Bank of Commerce v.....	484
Boysen, State v.....	338
Bridges, State ex rel. Bussell v.....	268
Brigham-Hopkins Co. v. Gross.....	277
Browder v. Phinney.....	74
Bullock v. White Star Steamship Co.....	448
Campbell, Alden v.....	392
Canadian Bank of Commerce v. Bingham.....	484
Chevalier & Co. v. Wilson.....	227
Clancy v. McElroy	567
Clark, State v.....	439
Colfelt, Spokane & Vancouver Gold & Copper Co. v.....	628
Collins, McNicol v.....	318
Commercial Co., Spencer v.....	520
Commercial Investment Co., Pierce v.....	272
Connelly Shoe Co., McDaniels v.....	549
Coulter, Jordan v.....	116
Cranney, State ex rel. Race v.....	594
Cresswell v. Spokane County.....	620
Crowley v. McDonough.....	57
Czarecki v. Seattle & San Francisco Railway & Navigation Co.	288

	<i>Page.</i>
Daulton v. Stuart.....	562
David v. Guich.....	266
Davis & Co., Lough v.....	204
Denham, State v.....	643
Drake v. Seattle.....	81
Drumheller v. American Surety Co. of New York.....	530
Dunsmuir v. Port Angeles Gas, Water, Light and Power Co..	586
Ellis, State v.....	369
F. Chevalier & Co. v. Wilson.....	227
Feas's Estate, <i>In re</i>	51
Fenton, State v.....	325
Fidelity Insurance, Trust & Safe Deposit Co. v. Nelson.....	340
Filley v. Murphy.....	1
First National Bank of Seattle v. Gordon Hardware Co.....	127
Foster v. Pacific Clipper Line.....	515
Galland-Burke Brewing & Malting Co., American Copper, Brass & Iron Works v.....	178
Gay v. Havermale.....	622
Geddis v. Packwood.....	270
Gladwin v. Ames.....	608
Goe v. Northern Pacific Ry Co.....	654
Gordon Hardware Co., First National Bank of Seattle v.....	127
Gowey, McDaniels v.....	412
Graham, State <i>ex rel.</i> Race v.....	704
Gray v. Washington Water Power Co.....	154
Gray v. Washington Water Power Co.....	665
Green v. Western American Co.	87
Gross, Brigham-Hopkins Co. v.....	277
Guich, David v.....	266
Harper, Anderson v.....	378
Havermale, Gay v.....	622
Higgins v. Nethery.....	239
Hoquiam, Randall v.....	435
Horr, Lord v.....	477
Howe v. Northern Pacific Ry. Co.....	569
<i>In re</i> Feas's Estate	51
<i>In re</i> Murphy's Estate.....	9
<i>In re</i> Yamashita	234
J. J. Connelly Shoe Co., McDaniels v.....	549
John Davis & Co., Lough v.....	204
Johnson v. San Juan Fish & Packing Co.....	162
Johnson, Sullivan v.....	72

	<i>Page.</i>
Jones v. Swift & Co.....	462
Jordan v. Coulter.....	116
Jordan v. Seattle.....	298
Kline v. Stein.....	189
Koyukuk Mining Co. v. Van De Vanter.....	385
La Conner Trading & Transportation Co., Lambert v.....	346
Lambert v. La Conner Trading & Transportation Co.....	346
Langford v. Murphrey.....	499
Laugenour, Smalley v.....	307
Lord v. Horr.....	477
Lough v. John Davis & Co.....	204
McCorkle v. Mallory.....	632
McDaniels v. Gowey.....	412
McDaniels v. J. J. Connely Shoe Co.....	549
McDonough, Crowley v.....	57
McElroy, Clancy v.....	567
McNicol v. Collins.....	318
Maggs v. Morgan.....	604
Mallory, McCorkle v.....	632
Moore Investment Co., Sutter v.....	333
Moore, Richardson v.....	406
Moran Bros. Co., Morton v.....	362
Morgan, Maggs v.....	604
Morton v. Moran Bros. Co.....	362
Murphrey, Langford v.....	499
Murphy, Filley v.....	1
Murphy's Estate, <i>In re</i>	9
Murrey, State v.....	383
Nash v. Wakefield.....	556
Nash v. Wakefield.....	581
National Bank of Commerce, Adams v.....	20
Neal, State <i>ex rel.</i> Zent v.....	702
Nelson, Fidelity Insurance, Trust & Safe Deposit Co. v.....	340
Nethery, Higgins v.....	239
New York Security & Trust Co. v. Tacoma.....	661
Northern Pacific Ry. Co., Goe v.....	654
Northern Pacific Ry. Co., Howe v.....	569
Northport Mining & Smelting Co., Sterrett v.....	164
Olson v. Seattle.....	687
Oudin, Bergman v.....	703
Pacific Clipper Line, Foster v.....	515

	<i>Page.</i>
Packwood, Geddis v.....	270
Paulson, Robins v.....	459
Phinney, Browder v.....	74
Pierce v. Commercial Investment Co.....	272
Port Angeles Gas, Water, Light & Power Co., Dunsmuir v....	586
Port Blakely Mill Co., Roberts v.....	25
Portland Coffee & Spice Co., Ross v.....	647
Prescott v. Puget Sound Bridge & Dredging Co.....	158
Puget Sound Bridge & Dredging Co., Prescott v.....	158
 Ralph v. American Bridge Co. of New York.....	500
Randall v. Hoquiam.....	435
Readman Warehouse Co., Windell v.....	469
Richardson v. Moore	406
Riplinger, State <i>ex rel.</i> Lowman & Hanford Stationery & Printing Co. v.....	281
Roberts v. Port Blakely Mill Co.....	25
Roberts v. White River Water Power Co.....	430
Robins v. Paulson.....	459
Robinson v. Thoma	129
Roeder, Seattle & Montana R. R. Co. v.....	244
Roller, State v.....	692
Rosario Straits Packing Co. v. Sunset Packing Co.....	50
Ross v. Portland Coffee & Spice Co.....	647
 St. John, State <i>ex rel.</i> Rush v.....	630
San Juan Fish & Packing Co., Johnson v.....	162
Sawdye v. Spokane Falls & Northern Railway Co.....	349
Sayles v. Walla Walla County.....	194
Schroeder, Adams County v.....	703
Seattle, Drake v.....	81
Seattle, Jordan v.....	298
Seattle, Olson v.....	687
Seattle, Stone v.....	65
Seattle & Montana R. R. Co. v. Roeder.....	244
Seattle & San Francisco Railway & Navigation Co., Czar- ecki v.....	288
Sims, White Crest Canning Co. v.....	374
Smalley v. Laugenour.....	307
Smith v. Veysey.....	18
Spencer v. Commercial Co.....	520
Spokane, Bell v.....	508
Spokane & Vancouver Gold & Copper Co. v. Colfelt.....	628
Spokane County, Cresswell v.....	620
Spokane Falls & Northern Railway Co., Sawdye v.....	349

	<i>Page.</i>
State v. Anderson.....	14
State v. Boysen.....	338
State v. Clark.....	439
State v. Denham.....	643
State v. Ellis.....	369
State v. Fenlon.....	325
State v. Murrey.....	383
State v. Roller.....	692
State v. Stentz.....	134
State v. Whitworth.....	47
State v. Yourex.....	611
State <i>ex rel.</i> Bauer v. Sunset Telephone & Telegraph Co.....	676
State <i>ex rel.</i> Bussell v. Bridges.....	268
State <i>ex rel.</i> Carrau v. Superior Court of King County.....	700
State <i>ex rel.</i> Dutch Miller Mining & Smelting Co. v. Superior Court of Kittitas County	43
State <i>ex rel.</i> Foster v. Superior Court of King County.....	156
State <i>ex rel.</i> Lowman & Hanford Stationery & Printing Co. v. Riplinger.....	281
State <i>ex rel.</i> Norris Safe & Lock Co. v. Superior Court of King County.....	177
State <i>ex rel.</i> Quandt v. Superior Court of King County.....	197
State <i>ex rel.</i> Race v. Cranney.....	594
State <i>ex rel.</i> Race v. Graham.....	704
State <i>ex rel.</i> Rush v. St. John.....	630
State <i>ex rel.</i> Sanglin v. Superior Court of King County.....	232
State <i>ex rel.</i> Smith v. Superior Court of King County.....	219
State <i>ex rel.</i> Zent v. Neal.....	702
Stein, Kline v.....	189
Stentz, State v.....	134
Sterrett v. Northport Mining & Smelting Co.....	164
Stewin v. Thrift.....	36
Stone v. Seattle.....	65
Stuart, Daulton v.....	562
Sullivan v. Johnson.....	72
Sunset Packing Co., Rosario Straits Packing Co. v.....	50
Sunset Telephone & Telegraph Co., State <i>ex rel.</i> Bauer v.....	676
Superior Court of King County, State <i>ex rel.</i> Carrau v.....	700
Superior Court of King County, State <i>ex rel.</i> Foster v.....	156
Superior Court of King County, State <i>ex rel.</i> Norris Safe & Lock Co. v.....	177
Superior Court of King County, State <i>ex rel.</i> Quandt v.....	197
Superior Court of King County, State <i>ex rel.</i> Sanglin v.....	232
Superior Court of King County, State <i>ex rel.</i> Smith v.....	219

	<i>Page.</i>
Superior Court of Kittitas County, State <i>ex rel.</i> Dutch Miller	
Mining & Smelting Co. v.....	43
Sutter v. Moore Investment Co.	333
Swift & Co., Jones v.....	462
Tacoma, New York Security & Trust Co. v.....	661
Tacoma Railway & Power Co., Atherton v.....	395
Thoma, Robinson v.....	129
Thrift, Stewin v.....	36
Van De Vanter, Koyukuk Mining Co. v.....	385
Veysey, Smith v.....	18
Wakefield, Nash v.....	556
Wakefield, Nash v.....	581
Wallace Lumber & Mfg. Co., Anderson v.....	147
Walla Walla County, Sayles v.....	194
Washington Water Power Co., Gray v.....	154
Washington Water Power Co., Gray v.....	665
Western American Co., Green v.....	87
White Crest Canning Co. v. Sims.....	374
White River Water Power Co., Roberts v.....	430
White Star Steamship Co., Bullock v.....	448
Whitworth, State v.....	47
Wilson, F. Chevalier & Co. v.....	227
Windell v. Readman Warehouse Co.....	469
Yamashita, <i>In re</i>	234
Yourex, State v.....	611

TABLE OF CASES CITED

	<i>Page.</i>
Adams v. Ames , 19 Wash. 425	181
Ah How v. Furth , 13 Wash. 550	193
Albro v. Jaquith , 4 Gray, 99	211
Allen v. Alien , 72 Iowa, 502.	642
Allend v. Spokane Falls, etc., Ry. Co. , 21 Wash. 324.....	409, 626
Alloway v. Nashville , 88 Tenn. 510	264
American Surety Company v. Lauber , 22 Ind. App. 326	542
Anderson v. Inland Telephone, etc., Co. , 19 Wash. 575	368
Armstrong v. Van De Vanter , 21 Wash. 682	280
Asher v. Sekofsky , 10 Wash. 379	54, 313
Askam v. King County , 9 Wash. 1	681
Atkins v. State , 60 Ala. 45	144
Atkinson v. Waterworks Co. , 2 Exch. Div. 441	107
Austin v. Clifford , 24 Wash. 172	40
Bailey v. Busaing , 37 Conn. 349	574
Baily v. Baily , 69 Iowa, 77	642
Baird v. Shipman , 132 Ill. 16	213
Baker-Boyer National Bank v. Hughson , 5 Wash. 100.	151
Baldwin v. State , 111 Ala. 11	144
Baltimore & O. R. R. Co. v. Henthorne , 73 Fed. 634	115
Baltimore & P. R. R. Co. v. Reaney , 42 Md. 117	804
Barnett v. Ashmore , 5 Wash. 168	686
Barry v. Coombe , 1 Pet. 640	152
Beall v. Seattle , 28 Wash. 593	488
Beattie v. Edge Moor Bridge Works , 109 Fed. 283	507
Beauchamp v. Saginaw Mining Co. , 50 Mich. 163	804
Bell v. Josselyn , 3 Gray, 309	211
Beuttell v. Chicago, M. & St P. Ry. Co. , 26 Fed. 50	574
Bidwell v. Tacoma , 26 Wash. 518	664
Black v. State , 118 Wis. 206	441
Blyhl v. Waterville , 57 Minn. 115	70
Boom Co. v. Patterson , 98 U. S. 403	263
Bostwick v. Baltimore, etc., R. R. Co. , 45 N. Y., 712	476
Bowden v. Achor , 95 Ga. 248	322
Briggs v. Morse , 42 Conn. 258	422
Brigham-Hopkins Co. v. Gross , 107 Fed. 769	280
Brigham-Hopkins Co. v. Gross , 20 Wash. 218	278
Brooks v. Bates , 7 Colo. 577	280
Brooks v. James , 16 Wash. 885	376
Brown v. Seattle , 5 Wash. 85	690
Bullivant v. Spokane , 14 Wash. 577	657
Burian v. Seattle Electric Co. , 26 Wash. 606	349
Burke v. McCowen , 115 Cal. 481	691
Butler v. Townsend , 126 N. Y. 105	505
Byers v. Rothschild , 11 Wash. 296	626
Campbell v. Hall , 28 Wash. 626	683
Campbell v. Portland Sugar Co. , 62 Me. 552	215, 574

CASES CITED.

	<i>Page.</i>
Campbell v. Sterling Mfg. Co., 11 Wash. 204	461
Cantara v. Blackwell, 14 Wash. 294	624
Carey v. Rochereau, 16 Fed. 87	208
Carlin v. Ritter, 68 Md. 478	528
Carpenter v. Barry, 26 Wash. 255	627
Carrigan v. Port Crescent Improvement Co., 6 Wash. 590	153
Carver v. Detroit & S. Plank Road Co., 61 Mich. 584	69
Cason v. Cason, 15 Ga. 405	642
Cedar Rapids, etc., Ry. Co. v. Raymond, 87 Minn. 204	256
Chandler v. Borough of Cambridge Springs, 200 Pa. St. 230	546
Chezum v. McBride, 21 Wash. 558	624
Chicago v. Neben, 165 Ill. 371	70
Chicago & A. R. R. Co. v. Maroney, 170 Ill. 520	507
Chicago & A. R. R. Co. v. Scanlan, 170 Ill. 106	507
Chicago & A. R. R. Co. v. Sullivan, 63 Ill. 293	116
Chicago & E. R. R. Co. v. Blake, 116 Ill. 163	251
Chicago, B. & Q. R. R. Co. v. Avery, 109 Ill. 314	507
Chicago, etc., Ry. Co. v. Ross, 112 U. S. 377	579
Childs Lumber, etc., Co. v. Page, 28 Wash. 128	635
Christensen v. Union Trunk Line, 6 Wash. 75	402
Christianson v. Pacific Bridge Co., 27 Wash. 582	368
Circleville v. Sohn, 59 Ohio St. 285	70
Clapp v. Mason, 94 U. S. 589	446
Clark v. Fry, 8 Ohio St. 358	574
Clason v. Bailey, 14 Johns. 487	152
Clay v. Selah Valley Irrigation Co., 14 Wash. 543	229
Clemence v. Auburn, 66 N. Y. 334	70
Clukley v. Seattle Electric Co., 27 Wash. 70	305, 349
Coburn v. Litchfield, 132 Mass. 449	422
Colby v. Spokane, 12 Wash. 690	690
Coleman v. Columbia & P. S. R. R. Co., 8 Wash. 227	201
Collins v. Hall, 5 Wash. 366	527
Commander v. State, 60 Ala. 1	144
Commercial Electric Light & Power Co. v. Tacoma, 17 Wash. 661	635
Commonwealth v. Jolliffe, 7 Watts, 585	143
Conlon v. St. Paul, 70 Minn. 216	68
Correll v. Railway Co., 38 Iowa, 124	106
Costa v. Pacific Coast Co., 26 Wash. 188	103, 294
Cowle v. Seattle, 22 Wash. 659	404
Crofoot v. Moore, 4 Vt. 204	419
Cullum v. Latimer, 4 Tex. 329	602
Curry v. Spencer, 61 N. H. 624	441
Dallas v. Jones, 93 Tex. 38	70
Daniel v. State, 103 Ga. 202	373
Davis v. Detroit & M. R. R. Co., 20 Mich. 105	115
Davis v. Tribune Job Printing Co., 70 Minn. 95	520
Dawson v. McCarty, 21 Wash. 314	517
Dearborn Foundry Co. v. Augustine, 5 Wash. 67	606
Delaney v. Rochereau, 34 La. An. 1123	207
Deavergne v. Norris, 7 Johns. 358	422
De Mattos v. Jordan, 15 Wash. 378	542
Denny v. Sayward, 10 Wash. 422	354
Denver & R. G. Ry. Co. v. Schmitt, 11 Colo. 56	322
Deposit Bank of Georgetown v. Fayette National Bank, 90 Ky. 10	496
Detroit v. Blachey, 21 Mich. 84	69

	<i>Page.</i>
Dexter Horton & Co. v. Sparkman, 2 Wash.	165
Dietrichs v. Lincoln & N. W. R. R. Co., 12 Neb.	225
Dodge v. Railroad Co., 34 Iowa,	276
Doran v. Seattle, 24 Wash.	182
Dorenus v. Root, 23 Wash.	710
Doyle v. Chicago, etc., Ry. Co., 77 Iowa,	807
Driscoll v. City of Fall River, 163 Mass.	105
Drury v. Young, 58 Md.	546
Duggan v. Pacific Boom Co., 6 Wash.	593
Dunsmuir v. Port Angeles, etc., Power Co., 24 Wash.	104
Dupuis v. Chicago & N. W. Ry. Co., 115 Ill.	97
Dwinel v. Brown, 54 Me.	470
East St. Louis I. & C. S. Co. v. Crow, 52 Ill. App.	573
Eastes & Eastes, 79 Ind.	363
Eaton v. Lyman, 30 Wis.	41
Edgeworth v. Wood, 58 N. J. Law.	463
Edson v. Knox, 8 Wash.	642
Ellis v. McNaughton, 76 Mich.	237
Ellis v. Ohio Life Ins. & Trust Co., 4 Ohio St.	628
Elster v. Seattle, 18 Wash.	304
Enoch v. Spokane Falls, etc., Ry. Co., 6 Wash.	393
Estabrook v. Hughes, 8 Neb.	496
Evans v. Adams Express Co., 122 Ind.	362
Everett Land Co. v. Maney, 16 Wash.	552
Fyre v. Jacob, 14 Grat.	422
Fairfield v. Binnian, 13 Wash.	1
Fairhaven Land Co. v. Jordan, 5 Wash.	729
Fellow's Case, 5 Greenl.	333
Feltus v. Swan, 62 Miss.	415
Fenton v. Morgan, 16 Wash.	30
Filley v. Murphy, 30 Wash.	1
First National Bank v. First National Bank, 151 Mass.	280
First National Bank v. Marshalltown State Bank, 107 Iowa,	827
First National Bank v. Northern Pacific Ry. Co., 28 Wash.	439
Fischer v. Woodruff, 25 Wash.	87
Fitch v. Applegate, 24 Wash.	25
Flanigan v. Guggenheim Smelting Co., 63 N. J. Law.	647
Fleetwood v. Read, 21 Wash.	547
Fleischfresser v. Schmidt, 41 Wis.	223
Freeman v. Ambrose, 12 Wash.	1
French v. Seattle Traction Co., 26 Wash.	264
Ganser v. Ganser, 83 Minn.	199
Gardner v. Railroad Co., 150 U. S.	349
Garneau v. Port Blakely Mill Co., 8 Wash.	467
Gay v. Havermale, 27 Wash.	390
Geisthorpe v. Furnell, 20 Mont.	299
Germania Bank v. Boutell, 60 Minn.	189
Gilman v. Eastern R. R. Co., 13 Allen,	433
Gilman v. Eastern R. R. Corporation, 10 Allen,	283
Gilmore v. The H. W. Baker Co., 12 Wash.	468
Gladwin v. Ames, 26 Wash.	272
Glass v. Colman, 14 Wash.	635
Gloucester Bank v. Salem Bank, 17 Mass.	83
Gordon v. Gordon, 141 Ill.	160

	<i>Page.</i>
Gordon v. Gordon, 41 Ill. App. 187	642
Gorris v. Scott, L. R. 9 Exch. 125	107
Gould v. Topeka, 32 Kan. 485	70
Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700	580
Gray v. Washington Water Power Co., 27 Wash. 718	155, 658, 667
Greenberg v. Whitcomb Lumber Co., 90 Wis. 225	574
Groves v. Lord Wimborne (1898), 2 Q. B. 402	107
Guillaume v. General Transportation Co., 100 N. Y. 491	476
Gunderson v. Gunderson, 25 Wash. 459	842
Gundlach v. Schott, 192 Ill. 509	104
Gustin v. Jose, 10 Wash. 217	159
Hall v. Union Central Life Ins. Co., 23 Wash. 610	38
Ham v. Hill, 29 Mo. 275	418
Hand v. Baynes, 4 Whart. 204	455
Happy v. Prickett, 24 Wash. 290	344
Harder, etc., Min. Co. v. Schmidt, 104 Fed. 282	104
Hardin v. State, 66 Ark. 53	144
Harrington v. Herrick, 64 Fed. 468	279
Haugh v. Tacoma, 12 Wash. 386	59
Hedderich v. Smith, 103 Ind. 208	528
Henry v. Grant Street Electric Ry. Co., 24 Wash. 246	34
Hess v. Rosenthal, 160 Ill. 621	507
Hice v. Orr, 18 Wash. 163	688
Hilts v. Chicago & G. T. Ry. Co., 55 Mich. 487	115
Hinds v. Marshall, 22 Mo. App. 208	70
Hogan v. Kyle, 7 Wash. 595	154
Holst v. Streitz, 16 Neb. 249	691
Holt Ice, etc., Co. v. Auther Jordan Co., 25 Ind. App. 814	519
Hooker v. Chicago, etc., Ry. Co., 76 Wis. 542	32
Horbach v. State, 43 Tex. 242	373
Hough v. Railroad Co., 100 U. S. 213	109
Howell v. North American, etc., Trading Co., 24 Wash. 689	185
Hughes v. Dexter Horton & Co., 26 Wash. 110	325
Hurd v. People, 25 Mich. 406	140
Illinois Steel Co. v. Schymanowski, 162 Ill. 447	105
Indianapolis v. Marold, 25 Ind. App. 428	85
In re Ah Yup, 5 Sawy. 165	237
In re Alfstad's Estate, 27 Wash. 175	7
In re Baldwin's Estate, 13 Wash. 666	242
In re Camille, 6 Fed. 258	237
In re Gee Hop, 71 Fed. 274	236
In re Gorkow's Estate, 28 Wash. 65	6
In re Hong Yen Chang, 84 Cal. 163	286
In re Kanaka Nian, 6 Utah, 659	237
In re Levy, 101 Fed. 247	316
In re Merriam's Estate, 141 N. Y. 479	446
In re Murphy's Estate, 26 Wash. 222	128
In re Murphy's Estate, 30 Wash. 9	55
In re Po, 28 N. Y. Supp. 383	237
In re Rodriguez, 81 Fed. 337	238
In re Salto, 62 Fed. 126	237
In re Wilmerding, 117 Cal. 281	446
Iowa & California Land Co. v. Hoag, 132 Cal. 627	345
Irving v. Irving, 26 Wash. 122	233

	<i>Page.</i>
Jacobson v. Lunn, 16 Wash. 487	229
Jaquith v. Hudson, 5 Mich. 128	425
Jennings v. McCormick, 25 Wash. 427	546
Johnson v. Lighthouse, 8 Wash. 32	206
Johnson v. Superior Court, 68 Cal. 578	642
Johnson v. Tacoma Mill Co., 22 Wash. 88	388
Jordan v. Seattle, 26 Wash. 61	110, 299, 349
Joyce v. Capel, 8 Car. & P., 370	466
Jungerman v. Bovee, 19 Cal. 355	528
Kaiser v. Latimer, 57 N. Y. Supp. 888	520
Kaufman v. Tacoma, Olympia, etc., R. R. Co., 11 Wash. 632	255
Keef v. Tibbals, 18 Wash. 656	207
Keiso v. Reid, 145 Pa. St. 606	188
Kendall v. Alba, 73 Iowa, 241	70
Kerr v. Kingsbury, 88 Mich. 150	529
Keyser v. Chicago & G. T. Ry. Co., 66 Mich. 390	32
King v. New York Central, etc., R. R. Co., 72 N. Y. 607	31
King v. Woodbridge, 34 Vt. 565	476
Kinkead v. Holmes & Bull Furniture Co., 24 Wash. 216	626
Kleeb v. Bard, 7 Wash. 41	151
Knighton v. Curry, 82 Ala. 404	593
Knowles v. Rogers, 27 Wash. 211	376
Krutz v. Robbins, 12 Wash. 7	424
Kuhn v. Mason, 24 Wash. 94	624
Labadie v. Hawley, 61 Tex. 177	208
Lane v. Cotton, 12 Mod. 472	208
Langert v. Ross, 1 Wash. 250	151
Lansing v. Toolan, 37 Mich. 152	68
Lapleine v. Steamship Co., 40 La. An. 661	305
Laurie v. Ballard, 25 Wash. 127	488
Levy v. Bank of the United States, 4 Dall. 234	492
Lewis v. Ocean Navigation Pier Co., 125 N. Y. 341	529
Lewis County v. Gordon, 20 Wash. 80	631
Lindvall v. Woods, 41 Minn. 212	505
Loos v. Hondema, 10 Wash. 164	68
Lottman v. Barnett, 62 Mo. 159	216
Lough v. Davis & Co., 30 Wash. 204	574
Loughran v. Ross, 45 N. Y. 792	528
Louisville & N. R. R. Co. v. Jones, 88 Ala. 376	804
Louisville & N. R. R. Co. v. Orr, 91 Ky. 109	178
McBeath v. Rawle, 93 Ill. App. 212	506
McClellan v. Gaston, 18 Wash. 472	526
McCrea v. McCrea, 58 How. Pr. 220	642
McDonough v. Great Northern Ry. Co., 15 Wash. 244	408
McDonough v. Starbird, 105 Cal. 15	529
McMakin v. McMakin, 68 Mo. App. 57	641
McPherson v. Smith, 14 Wash. 226	460
McQuillan v. Seattle, 10 Wash. 464	349
McQuillan v. Seattle, 13 Wash. 600	84
Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283	444
Marble Saving Bank v. Williams, 28 Wash. 766	592
Marks v. Ryan, 68 Cal. 107	528
Mayer v. Thompson-Hutchison Bldg. Co., 104 Ala. 611	213
Miller v. Dumon, 24 Wash. 648	84

	Page.
Mills v. Maine Ice Co., 51 N. J. Law. 842	507
Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469	659
Minot v. Winthrop, 162 Mass. 113	446
Missouri Pacific Ry. Co. v. Beeson, 30 Kan. 298	476
Monk v. New Utrecht, 104 N. Y. 552	68
Montana Ry. Co. v. Warren, 187 U. S. 348	251
Montfort v. Hughes, 8 E. D. Smith, 591	574
Moriarty v. State, 62 Miss. 654	373
Mossgrove v. Zimbleman Coal Co., 110 Iowa, 169	106
Mulchey v. Methodist Religious Society, 125 Mass. 487	574
Mullan's Admir. v. Carper, 37 W. Va. 215	624
Munroe v. Sedro Lumber & Shingle Co., 16 Wash. 694	461
Murray v. Okanogan Live Stock, etc., Co., 12 Wash. 259	607
Mryberg v. Baltimore & S. M. & R. Co., 25 Wash. 364	105, 295
Narramore v. Cleveland, etc., Ry. Co., 96 Fed. 298	106
National Bank of North America v. Bangs, 106 Mass. 441	494
National Park Bank v. Ninth National Bank, 46 N. Y. 77	492
Nelson v. Danny, 26 Wash. 327	206
Newman v. Fowler, 37 N. J. Law. 89	574
New York & C. M. S. & Co. v. Rogers, 11 Colo. 6	33
Noil v. Seattle, 29 Wash. 28	438
Norfolk & W. R. R. Co. v. Hoover, 79 Md. 258	116
Norfor v. Busby, 19 Wash. 450	230
Norris v. Kohler, 41 N. Y. 42	466
Northern Counties Investment Trust v. Hender, 12 Wash. 559	287
Northern Pacific & P. S. R. R. Co. v. Coleman, 3 Wash. 228	255
Northern Pacific R. R. Co. v. Haas, 2 Wash. 376	275
Northern Pacific R. R. Co. v. O'Brien, 1 Wash. 599	580
Noyes v. Cosseman, 29 Wash. 635	73
O'Connor v. Chicago, M. & St. P. Ry. Co., 27 Minn. 166	32
Offut v. World's Columbian Exposition, 175 Ill. 472	105
Ohio & M. Ry. Co. v. Stein, 133 Ind. 254	33
Omaha Southern Ry. Co. v. Todd, 39 Neb. 818	822
O'Maley v. Gaslight Co., 158 Mass. 135	109
Onions v. Covington, etc., Ry. Co., 21 Ky. Law Rep. 820	174
Osborne v. Morgan, 130 Mass. 102	212
Owen v. Owen, 48 Mo. App. 208	642
Owens v. Lewis, 46 Ind. 488	152
Packwood v. Briggs, 25 Wash. 530	593
Page v. Parker, 40 N. H. 47	574
Park v. Board of Commissioners, 3 Ind. App. 539	85
Parker v. Atchison, 58 Kan. 29	175
Parker v. Dacres, 2 Wash. T. 430	271
Parsons v. Winchell, 5 Cush. 592	574
Payne v. Commonwealth, 1 Metc. (Ky.) 370	373
Peel v. Peel, 50 Iowa, 521	642
People v. Board of Supervisors, 27 Cal. 655	600
People v. Croton Aqueduct Board, 5 Abb. Pr. 372	600
People v. Vernon, 35 Cal. 49	38
People's Bank v. Franklin Bank, 88 Tenn. 299	495
Perkins v. Mitchell, Lewis & Staver Co., 15 Wash. 470	59
Phelps v. Wait, 30 N. Y. 78	574
Philbrick v. Andrews, 8 Wash. 7	54
Pierce v. Jung, 10 Wis. 30	188

	<i>Page.</i>
Pittsburg, etc., Ry. Co. v. Callaghan, 157 Ill. 406	466
Pittsburg, etc., Ry. Co. v. Ruby, 38 Ind. 294	116
Poole v. Jackson, 93 Tenn. 62	70
Port v. Huntington, etc., R. R. Co., 168 Pa. St. 19	262
Potter v. New Whatcom, 20 Wash. 589	663
Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92	575
Prescott v. Puget Sound Bridge & Dredging Co., 30 Wash. 158	163
Price v. Neal, 3 Burr. 1354	489
Pullman Palace Car Co. v. Leack, 143 Ill. 242	507
Quaker City National Bank v. Tacoma, 27 Wash. 259	664
Quesenberry v. State, 3 Stew. & P. 308	372
Racine v. J. I. Case Plow Co., 56 Wis. 539	691
Railroad Co. v. Babcock, 154 U. S. 190	109
Railway Co. v. Craig, 19 C. A. 631	107
Railroad Co. v. Lambright, 5 Ohio Cir. Ct. R. 433	107
Railway Co. v. Van Horne, 16 C. C. A. 182	107
Ralph v. American Bridge Co., 30 Wash. 500	580
Ramage v. Littlejohn, 16 Wash. 702	288
Ranahan v. Gibbona, 23 Wash. 255	60
Ransberry v. North American T. & T. Co., 22 Wash. 476	452
Rauch v. Chapman, 16 Wash. 568	608
Raymond v. Bales, 26 Wash. 493	168, 150
Bedford v. Spokane St. Ry. Co., 15 Wash. 419	405, 555
Redington v. Woods, 45 Cal. 406	492
Reichenbach v. Sage, 18 Wash. 864	187, 546
Rice v. Paulsen, 51 Ill. App. 123	507
Richardson v. Carbon Hill Coal Co., 6 Wash. 52	356
Richardson v. Carbon Hill Coal Co., 10 Wash. 648	354
Richardson v. Carbon Hill Coal Co., 18 Wash. 368	356
Roberts v. Port Blakely Mill Co., 30 Wash. 25	348
Roberts v. Spokane Street Ry. Co., 23 Wash. 325	403
Roche v. Mayor, 40 N. J. Law, 257	287
Root v. Town of Cincinnati, 87 Iowa, 208	691
Rowlstone v. C. & O Ry. Co., 54 S. W. 2	173
Russell v. Millett, 20 Wash. 212	273
Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121	520
Sackman v. Campbell, 15 Wash. 57	624
St. Louis, etc., Ry. Co. v. Ferguson, 64 S. W. 797	305
Sanford v. First National Bank, 94 Iowa, 680	188
Sanitary District of Chicago v. Loughran, 160 Ill. 362	262
Santa Ana v. Harlin, 99 Cal. 588	251
Savage v. Graham, 14 Wash. 323	268
Savage v. Sternberg, 19 Wash. 679	236
Saylor v. Montesano, 11 Wash. 328	438
Scholey v. Rew, 23 Wall. 331	446
Schoolfield's Exr. v. Lynchburg, 78 Va. 366	446
Schrader v. Port Huron, 106 Mich. 178	69
Schulte v. Holliday, 54 Mich. 73	468
Searle v. Lackawanna & B. R. R. Co., 33 Pa. St. 57	262
Sears v. Seattle, etc., Ry. Co., 8 Wash. 281	243
Seattle v. Liberman, 9 Wash. 276	684
Seattle & M. Ry. Co. v. Bellingham Bay & E. R. R. Co., 29 Wash. 491	223
Seattle Gas, etc., Co. v. Seattle, 6 Wash. 101	34
Seattle Transfer Co. v. Seattle, 27 Wash. 520	690

	<i>Page.</i>
Sebert v. Alpena, 78 Mich. 165	69
Second National Bank v. O. E. Merrill Co., 69 Wm. 501	529
Seelen v. Ryan, 2 Cin. R. 158	574
Seifert v. Brooklyn, 101 N. Y. 186	70
Selde v. Lincoln Co., 25 Wash. 198	708
Seward v. Derrickson, 12 Wash. 225	408
Shannon v. Consolidated Mining Co., 24 Wash. 119	108, 295
Skagit County v. Stiles, 10 Wash. 388	681
Small v. Railway Co., 50 Iowa, 388	106
Smith v. Baker (1891), App. Cas. 325	109
Smith v. Beard, 21 Wash. 204	267
Smith v. North American T. & T. Co., 20 Wash. 580	454
Smith v. Taylor, 2 Wash. 422	198
Smithson v. Woodin, 18 Wash. 709	268
Snow v. Railway Co., 8 Allen, 441	109
Sommer v. Carbon Hill Coal Co., 89 Fed. 54	108
Spades v. Murray, 2 Ind. App. 401	527
Spicer v. Hoop, 51 Ind. 865	188
Spokane & V. G. & C. Co. v. Colfelt, 24 Wash. 568	628
Spokane Falls v. Curry, 2 Wash. 541	228
Spurrier v. Front Street Cable Ry. Co., 3 Wash. 659	408
State v. Alston, 94 Tenn. 674	446
State v. Anderson, 20 Wash. 193	230
State v. Barber, 118 N. C. 711	145
State v. Boyce, 24 Wash. 514	688
State v. Costello, 28 Wash. 368	332
State v. Cushing, 14 Wash. 327	372
State v. Cushing, 17 Wash. 544	31, 17
State v. Dalrymple, 70 Md. 294	446
State v. Elkins, 68 Mo. 159	878
State v. Graham, 61 Iowa, 608	873
State v. Hamlin, 86 Me. 495	446
State v. Howard, 15 Wash. 425	229
State v. Humason, 4 Wash. 418	329
State v. Hyde, 20 Wash. 234	547
State v. Klein, 19 Wash. 368	18
State v. Kroenert, 13 Wash. 644	695
State v. McCormick, 20 Wash. 94	617
State v. McGraw, 59 Pac. 178	688
State v. Martin, 28 Mo. 530	145
State v. Moody, 18 Wash. 165	617
State v. Murphy, 9 Wash. 204	142
State v. Murphy, 13 Wash. 229	17
State v. Murphy, 15 Wash. 98	695
State v. Rutten, 18 Wash. 208	143
State v. Seaton, 26 Wash. 305	45
State v. Surry, 28 Wash. 655	84
State v. Vance, 29 Wash. 485	168, 230
State ex rel. Cann v. Moore, 23 Wash. 115	157
State ex rel. Colner v. Wickersham, 16 Wash. 161	683
State ex rel. Dusinberre v. Hunter, 4 Wash. 651	686
State ex rel. Lewis v. Hogg, 22 Wash. 646	157
State ex rel. Light Co. v. Superior Court, 20 Wash. 502	157
State ex rel. McIntyre v. Superior Court, 21 Wash. 108	158
State ex rel. Marsh v. Board of Land Commissioners, 7 Wyo. 478	601

	<i>Page.</i>
State ex rel. Menger v. Lauer, 55 N. J. Law. 705	467
State ex rel. Miller v. Lichtenberg, 4 Wash. 407	201
State ex rel. Mullen v. Superior Court, 15 Wash. 876	233
State ex rel. Race v. Cranney, 30 Wash. 594	704
State ex rel. Seattle Electric Co. v. Superior Court, 28 Wash. 317..	222
State ex rel. Smith v. Superior Court, 26 Wash. 278.....	221, 690
State ex rel. Townsend Gas, etc., Co. v. Superior Court, 20 Wash. 502	701
State ex rel. Vincent v. Benson, 21 Wash. 571	157
State ex rel. White v. Board of State Land Comrs., 23 Wash. 700..	157
Stearns v. Hochbrunn, 24 Wash. 206	625
Steele v. Northern Pacific Ry. Co., 21 Wash. 287	849
Stetson-Post Mill Co. v. Brown, 21 Wash. 619	276
Stewart v. Ripon, 88 Wis. 584	305
Stickley v. Chesapeake & O. R. R. Co., 98 Ky. 823	173
Strode v. Commonwealth, 52 Pa. St. 181	446
Strohn v. Detroit & M. Ry. Co., 21 Wis. 562	475
Sturgiss v. Dart, 28 Wash. 244	46
Suydam v. Moore, 8 Barb. 858	574
Svenson v. Atlantic Mail Steamship Co., 57 N. Y. 108	466
Swift v. Pacific Mail Steamship Co., 106 N. Y. 206	476
Tacoma Light & Water Co. v. Huson, 18 Wash. 124	250
Talbot v. Cruger, 151 N. Y. 117	528
Taylor v. Sandford, 7 Wheat. 18	428
Third National Bank v. Allen, 59 Mo. 812	495
Thomas v. Quartermaine, 18 Q. B. Div. 685	108
Thompson v. O'Neill, 41 Cal. 688	621
Tice v. Munn, 49 N. Y. 621	304
Tingley v. Bellingham Bay Boom Co., 5 Wash. 644	152
Traver v. Spokane Street Ry. Co., 25 Wash. 225	849
United States v. Perkins, 168 U. S. 625	446
Urquhart v. Ogdensburg, 91 N. Y. 67	68
Vail v. Tillman, 2 Wash. 476	151
Vance v. State, 56 Ark. 402	144
Walker v. McNeill, 17 Wash. 582	29
Walkup v. May, 9 Ind. App. 409	467
Warax v. Cincinnati, etc., Ry. Co., 72 Fed. 637	574
Washburn v. Milwaukee, etc., R. R. Co., 59 Wis. 864	259
Washington Brick, etc., Co. v. Adler, 12 Wash. 24	460
Washington Liquor Co. v. Alladio Cafe Co., 28 Wash. 176	627
Watriss v. First National Bank, 124 Mass. 571	528
Watson v. Sawyer, 12 Wash. 36	128, 311
West v. The Uncle Sam, 1 McAll. 505	455
Western Stone Co. v. Whalen, 151 Ill. 472	116
Whitcomb v. Smithson, 175 U. S. 635	575
White v. Ballard, 19 Wash. 284	71
White v. State, 73 Miss. 50	145
Whitman v. Mast, 11 Wash. 318	344
Wicker v. Hoppock, 6 Wall. 94	419
Wilkes v. Hunt, 4 Wash. 100	592
Wilkes v. Davies, 8 Wash. 112	592
Willets v. Burgess, 34 Ill. 494	423
Williams v. Lane, 62 Mo. App. 66	528
Windt v. Banniza, 2 Wash. 147	228

	<i>Page.</i>
Winsor v. Johnson, 5 Wash. 429	461
Wintermute v. Carner, 8 Wash. 585	376, 606
Wis. Cent. R. R. Co. v. Ross, 142 Ill. 9	507
Wiss v. Stewart, 16 Wash. 376	54, 313
Wollin v. Smith, 27 Wash. 349	45
Wooding v. Puget Sound National Bank, 11 Wash. 527	274
Wright v. Commissioners of Gallatin County, 6 Mont. 29	601
Wright v. Compton, 53 Ind. 337	574
Wright v. MacDonnell, 88 Tex. 140	529
Wright v. Wilcox, 19 Wend. 343	574
Young v. Consolidated Implement Co., 23 Utah, 586	529
Young v. Gaut, 69 Ark. 114	546
Zindorf Construction Co. v. Western American Co., 27 Wash. 31	45

STATUTES CITED AND CONSTRUED.

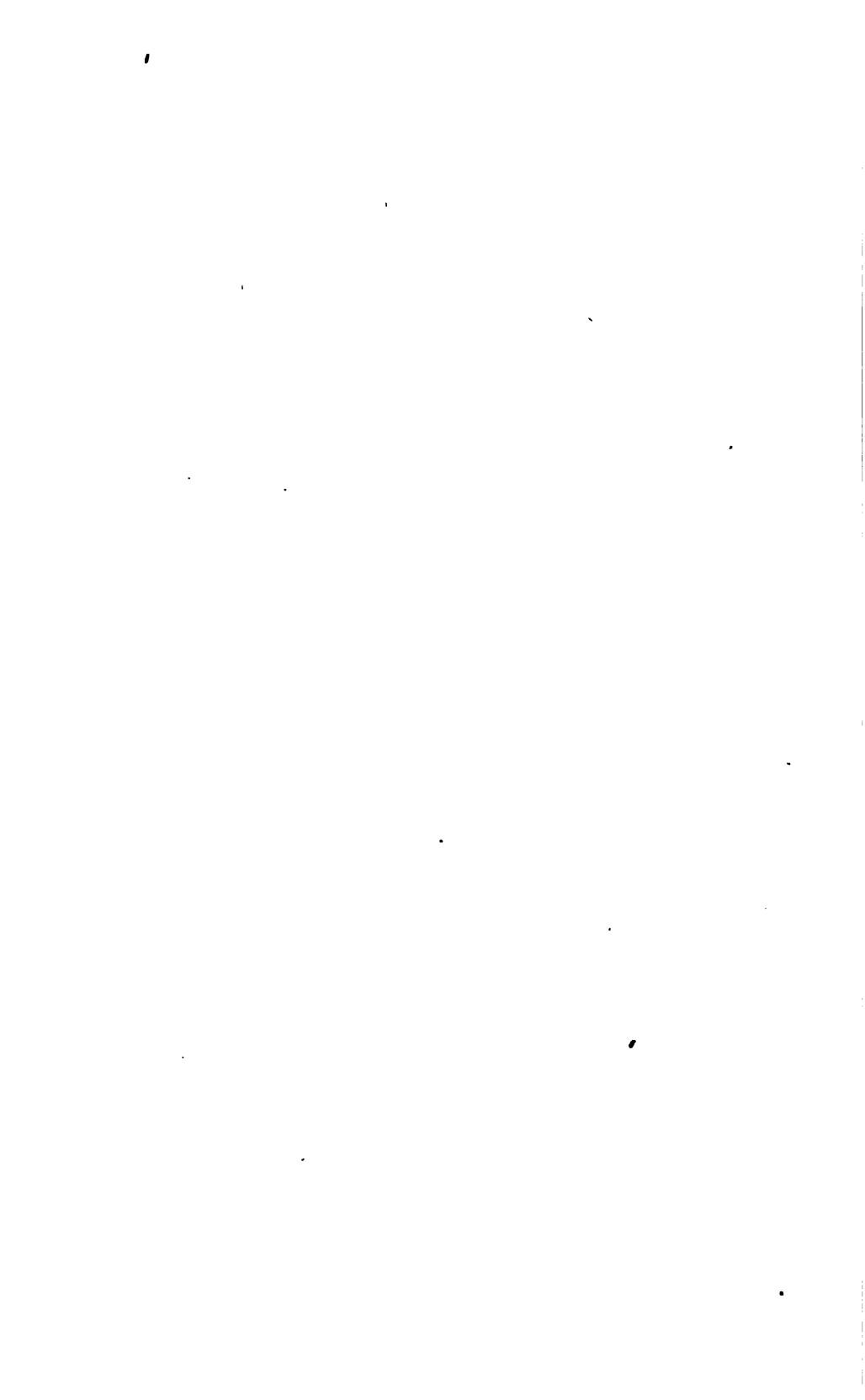
	<i>Page.</i>
Constitution, article 1, section 1	448
Constitution, article 1, section 16	224, 254
Constitution, article 1, section 21	325
Constitution, article 1, section 22	142
Constitution, article 1, section 30	448
Constitution, article 4, section 4	224
Constitution, article 7, section 1	445
Constitution, article 7, section 2	445
Constitution, section 7, article 5	445
Constitution, article 7, section 9	446
Code Procedure, 1891, section 481	54
Code Procedure, 1891, section 518	271
General Statutes, 1891, sections 1648, 1649	590
General Statutes, 1891, section 2973	196
Ballinger's Code, section 1564	196
Ballinger's Code, section 3165	294
Ballinger's Code, section 3178	88
Ballinger's Code, section 3590	476
Ballinger's Code, sections 4517, 4518	151
Ballinger's Code, sections 4558, 4559	590
Ballinger's Code, section 4595	242
Ballinger's Code, section 4730	142
Ballinger's Code, section 4783	279
Ballinger's Code, section 4793	76
Ballinger's Code, section 4805	167
Ballinger's Code, section 4807	621
Ballinger's Code, section 4812	280
Ballinger's Code, sections 4843 - 4845	565
Ballinger's Code, section 4913a	482
Ballinger's Code, section 4942, subdivision 1	634
Ballinger's Code, section 4949	169
Ballinger's Code, section 4967	6
Ballinger's Code, section 4970	629
Ballinger's Code, section 4983	141
Ballinger's Code, section 4984, subdivision 2	637
Ballinger's Code, section 4988	141
Ballinger's Code, section 4998, subdivision 5	253
Ballinger's Code, section 4997	325
Ballinger's Code, section 5001	141
Ballinger's Code, section 5058	62
Ballinger's Code, section 5062	62
Ballinger's Code, section 5171	391
Ballinger's Code, section 5214 et seq.	313
Ballinger's Code, section 5220	56
Ballinger's Code, section 5237	38
Ballinger's Code, section 5248	38
Ballinger's Code, section 5244	39, 54

	<i>Page.</i>
Ballinger's Code, section 5245	89
Ballinger's Code, section 5246	39, 55
Ballinger's Code, section 5367	273
Ballinger's Code, section 5409	551
Ballinger's Code, section 5527	526
Ballinger's Code, section 5718	640
Ballinger's Code, section 5755	599
Ballinger's Code, section 5760	599
Ballinger's Code, section 5775	599
Ballinger's Code, sections 5930, 5931	460
Ballinger's Code, section 5966	391
Ballinger's Code, section 5991	193
Ballinger's Code, section 6012	354
Ballinger's Code, section 6087	241
Ballinger's Code, section 6188	279
Ballinger's Code, sections 6189, 6190	278
Ballinger's Code, section 6201	567
Ballinger's Code, section 6208	568
Ballinger's Code, section 6215	42, 55
Ballinger's Code, section 6219	38, 55
Ballinger's Code, section 6220	11, 55
Ballinger's Code, section 6222	40
Ballinger's Code, section 6312	561
Ballinger's Code, section 6500, subdivision 7	45, 384
Ballinger's Code, sections 6503, 6504	312
Ballinger's Code, section 6506	283, 330
Ballinger's Code, section 6507	202
Ballinger's Code, section 6514	58
Ballinger's Code, section 6529	330
Ballinger's Code, section 6535	409, 626
Ballinger's Code, section 6678	615
Ballinger's Code, section 6683	615
Ballinger's Code, section 6695	615
Ballinger's Code, section 6802	139
Ballinger's Code, section 6832	139
Ballinger's Code, section 6845	16
Ballinger's Code, section 7062	696
Ballinger's Code, section 7119	49
Laws 1854, p. 135, section 23	621
Laws 1862-63, p. 90, section 40	621
Laws 1869, p. 10, section 35	621
Laws 1885-86, p. 48, section 19	273
Laws 1885-86, p. 46, section 88	274
Laws 1889-90, p. 34	615
Laws 1889-90, p. 302, section 2	196
Laws 1889-90, p. 302, sections 3-31	195
Laws 1889-90, p. 652	631
Laws 1891, p. 322, section 109	591
Laws 1893, p. 19	461
Laws 1893, p. 76	631
Laws 1893, p. 95	273
Laws 1893, p. 102, section 27	274
Laws 1893, p. 122, section 6	268
Laws 1893, p. 123	202
Laws 1893, p. 127	58

	<i>Page.</i>
Laws 1895, p. 109	40, 54
Laws 1895, p. 142	631
Laws 1895, p. 144, section 7	631
Laws 1895, p. 175, section 1	461
Laws 1895, p. 178	234
Laws 1895, p. 409	195
Laws 1895, p. 418, section 30	196
Laws 1897, p. 12	234
Laws 1897, p. 75, section 15	271
Laws 1897, p. 240, section 15	269
Laws 1899, p. 89, section 7	272
Laws 1899, p. 95, section 18	272
Laws 1899, p. 147	224
Laws 1901, p. 29, section 2	159, 163
Laws 1901, p. 67	440
Laws 1901, p. 213	222
Laws 1901, p. 222	552
Charter, Seattle (Freeholders'), article 9, sections 7, 12	287
Charter, Seattle (Freeholders'), article 14, sections 1-7	282
Charter, Seattle (Freeholders', amendment 1902), article 14, sections 1-7	283
Charter, Tacoma (Freeholders'), section 158	668
Charter, Tacoma (Freeholders'), section 216	398

ERRATA.

- Page 103. Twelfth line from bottom, read *Coast* in place of "Coal."
- Page 178. Third line from bottom, read *hearsay* in place of "hearing of."
- Page 375. Eighth line from top, read *cases* in place of "ecases."
- Page 307. Fourteenth line from top, read *himself* in place of "plaintiff."
- Page 385. Twenty-second line from top, read *inadmissible* in place of "admissible."



REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF WASHINGTON

[No. 4018. Decided September 16, 1902.]

GEORGE E. FILLEY, *Respondent*, v. JOHN MILLER MURPHY, *Appellant*.

30	1
30	78
30	1
37	423

JURISDICTION — PETITION FILED IN PROBATE — RIGHT TO TREAT AS CIVIL PROCEEDING.

Where a citation to a former administrator has been issued in probate, and he appears and demurs to the petition upon which it is based, on the ground that it raises an issue as to the title and right of possession of property, the demurrer should be overruled, inasmuch as the court has jurisdiction under the code procedure to treat the petition as in the nature of a complaint in a civil proceeding, and to settle the issues thereunder by proper trial.

SAME — RIGHT TO JURY TRIAL.

Where the pleadings in a case filed in probate raise the issue as to the right of possession of real and personal property, a jury trial is demandable, under Bal. Code, § 4967, which provides that an issue of fact in an action for the recovery of specific real or personal property shall be tried by a jury, unless a jury be waived.

ESTOPPEL — ADMINISTRATOR'S INDIVIDUAL PROPERTY INCLUDED IN INVENTORY.

The fact that an administrator, by mistake or in ignorance of legal rights, included his own property in an inventory of the

estate would not estop him from subsequently asserting his ownership.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Reversed.

George C. Israel, for appellant.

J. W. Robinson and *W. I. Agnew*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This is an appeal from a final order and judgment of the court upon a citation issued against appellant. The record shows that upon the petition of certain heirs at law of Eliza J. Murphy, deceased, the respondent, George E. Filley, was appointed administrator of the estate of said deceased to succeed the appellant. Appellant had theretofore been the acting and qualified administrator, but, owing to the withdrawal of one of his sureties from his bond as administrator, and the failure of appellant to file a new or additional bond within the statutory time, a vacancy occurred, which was filled as aforesaid. After the appointment of respondent, Filley, he demanded of appellant that he turn over to him all books of account, papers, credits, moneys, and personal property belonging to said estate relating to the Washington Standard newspaper and job printing office, and also demanded possession of what is known as the "opera house," together with all the property belonging to said estate used in connection with said opera house on Fourth street in Olympia, Washington, and all moneys which had come into appellant's hands as the party in possession of said opera house since October 26, 1896. The demand was made in writing, and to the demand appellant made written answer, in substance as follows: That the said opera house was then, and always had been, in his possession, not as

Sept. 1902.] Opinion of the Court—HADLEY, J.

administrator of said estate, but that said building was erected upon real estate one-half of which was his separate property, and that one-half of the expense of the erection of the building was paid by him from his separate funds; that the other half of said property belonged to the community consisting of himself and the deceased, who was his wife; that his possession and occupancy was that of a tenant in common with said estate, and that he had made report to the court of such possession, and was ready and willing to account at any time for one-half of the net earnings of the opera house since his removal as administrator; that said estate had not then, and never had, any interest in the Washington Standard printing plant and paper, or in any of the personal property connected therewith, the same having been his separate property, and being then owned by himself and sons as partners. Other property was mentioned in the said demand and answer, but no controversy exists in reference thereto, and the same need not be mentioned here. Upon receipt by respondent, Filley, of the aforesaid written answer of appellant, said Filley, as administrator, applied to the court for a citation requiring appellant to appear before the court and give a full account under oath of all property belonging to said estate in his possession, and that he be required to turn over the same to said administrator. Thereupon a citation was issued. The petition upon which the citation was issued contained as exhibits, and as a part thereof, copies of the aforesaid written demand and answer thereto, and appellant, appearing on the return day of the citation, demurred to the petition, and moved the court to dismiss the same, and quash the citation, for the alleged reason that it is apparent from the face of the petition and exhibits therein set forth that the court has no jurisdiction in this proceeding of the subject matter or

of the appellant for the purpose of trying title or right of possession to said property. The demurrer was overruled. Thereupon appellant answered the petition, in which he set forth the facts upon which he bases his claim of separate ownership in the newspaper property above mentioned, and also in the one-half of the opera house property. The administrator, by reply, denied the material averments of appellant's said answer, thus putting in issue the question of title and the facts upon which appellant claims the right of possession to the property demanded. The reply further alleged that appellant, when he was administrator, had caused all of said property to be inventoried as the property of said community, and that he is now estopped from claiming any portion thereof as his separate property. Upon the completion of the issues as above stated, the court announced that the issues thereby made were ready for trial. Whereupon appellant objected to the court trying the issues, for the reason that by the same the title to the property, both real and personal, must be determined upon the trial, and that the court, acting in probate, is without jurisdiction, and moved the court to transfer the same to the civil department for trial. The objection and motion were overruled. Thereupon appellant, in writing, demanded a jury trial of the said issues of separate ownership and right of possession, which was also denied. The court thereupon proceeded to try the issues involved without a jury, and thereafter entered judgment to the effect that the appellant is estopped to now assert a claim of ownership in any portion of said property as against the demand of his successor, and that he shall turn over to said administrator said opera house property and the undivided one-third interest in and to the Washington Standard news and job printing office, together with \$243 cash, shown to have been collected from

Sept. 1902.] Opinion of the Court—HADLEY, J.

said property since his removal as administrator, and also all papers, title deeds, and accounts in his hands relating to all of said property. From said judgment this appeal was taken.

It is assigned as error that the court overruled the appellant's demurrer to the petition for citation. This assignment is based upon the theory that the petition showed upon its face that the title and right of possession to certain property were involved, and that the court sitting in a probate proceeding could not hear it. If the demurrer had been interposed to the petition before the issuance of the citation, the question would then have been presented whether, under the facts stated, relief by way of citation could be had; but, in any event, we think the court might have proceeded to settle issues under the petition for trial. In this state we have no probate court, properly speaking, as distinguished from the court that entertains jurisdiction of other matters. The court of general jurisdiction also hears and determines probate matters. Matters pertaining to probate are referred to what is called "probate procedure," as distinguished from what is denominated "civil" or "criminal procedure." But when the court, sitting in a probate proceeding, discovers in a petition the statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder when an appearance has been made thereto, and then proceed to try it in a proper manner, as any other civil cause. The court may require the proceeding to be separately docketed, if, when the issues are formed, it appears to be such as should be thus docketed. Whether a citation should have issued on the strength of this petition or not, it is nevertheless true that appellant responded to the citation, and appeared generally by demurrer to the petition, and asked its dismissal simply on

the ground that the court could not hear it as a probate proceeding. We think it was not necessary to sustain the demurrer and dismiss the proceeding on that ground. But under our liberal practice as to the form of actions the petition could be treated as in the nature of a complaint. The issues could be framed thereunder, and the cause tried without requiring another statement of the same facts under some other form or name. If it developed that it was not properly a probate proceeding, it would not be treated as such. We think the court did not err in overruling the demurrer and in refusing to dismiss the petition.

It is assigned as error that the court refused to grant appellant a jury trial of the issues made by the pleadings. It is manifest that the averments and denials found in the pleadings squarely raise the issue as to the ownership of both real and personal property, and incidentally the right of possession to the same property is also involved. Section 4967, Bal. Code, provides as follows:

“An issue of fact, in an action for the recovery of money only, or of specific real or personal property, shall be tried by a jury, unless a jury is waived, as provided by law, or a reference ordered, as provided by statute relating to referees.”

From the above statute there seems to be no escape from the position that in a proceeding for the recovery of specific real or personal property the issues of fact shall be tried by a jury. *In re Gorkow's Estate*, 28 Wash. 65 (68 Pac. 174), it was sought to recover specific personal property by a proceeding filed in the probate case pending for the settlement of the estate. We held that the issue must be tried by a jury. It is true the estate made no claim to the fund there sought, and the controversy was wholly between outside parties as to the right of possession to a por-

Sept. 1902.] Opinion of the Court—HADLEY, J.

tion of a certain legacy, but we do not see that any distinction should be made in the application of the statutory principle when an estate itself happens to be one of the claimants for possession. *In re Alfstad's Estate*, 27 Wash. 175 (67 Pac. 593), this court held that the court in a probate proceeding to settle the accounts of the administrator and distribute the estate had not jurisdiction to determine the claim of the administrator to one-half of the estate as a partner of the deceased. The court, in its judgment in the case at bar, says it has inquired into the facts "incidentally for the purpose of determining the right of possession, and not for the purpose of determining the title." Under the statute above quoted it seems that the right of possession is the very thing to be tried by a jury, and we do not see, under the issues, how the questions of title and right of possession are to be separated. We understand it to have been the theory of the trial court that this should not be treated as an action or proceeding to recover specific property, but rather as a proceeding to require appellant, as the former administrator, to discharge a duty as such by way of turning over certain property of the estate. The issue is made, however, that it is not the property of the estate, and it never was. The court held the appellant estopped in this proceeding to claim ownership and right of possession as against his successor on the ground that the property was once included in an inventory, and it seems to have been the court's view that appellant must now yield possession, and may then institute an action of his own to recover it back, in which the issues here involved may be tried. We do not think it follows that appellant is estopped merely because the property may once have been included in an inventory. It is quite possible for property to be erroneously included in an inventory by one acting under pure mistake of facts or in

ignorance of legal rights. Such conditions in no way change the fact of the real ownership, and incidentally do not affect the right of possession attached to such ownership. It would seem unnecessary to require a present yielding of possession to that which is now squarely in issue before the court to be immediately followed by some other proceeding to recover it back under the same issues now tendered.

The authorities cited by respondent on the subject of estoppel do not seem to deal with an administrator who claims ownership in the disputed property himself, the actual possession of which was not changed by the administration; but rather with cases where the property originally came into the administrator's hands as estate property, and to which he asserted no prior ownership. Bigelow on Estoppel (5th ed.), page 554, is cited by respondent. In the discussion of cited cases the author observes:

"The court remarked that it might be that a trustee would not be estopped from setting up his own title by the acceptance of a trust in ignorance of his title, or through mistake, when he had done no act which it would be prejudicial to the beneficiaries for him to gainsay. And so perhaps a trustee, notified of an adverse claim, would not be required to surrender the assets until that claim was settled. But these principles did not touch the point in the present case. The administrator did not pretend to have any right to the cotton, or that anybody else was claiming it. The case was an open and undisguised attempt by a trustee to avail himself of his trust to make a personal profit out of an implied defect in the title to the property which had come into his hands. It was to the credit of the law, the court strongly observed, that it did not tolerate such a thing."

Thus, it appears the principle is recognized that a trustee is not estopped from setting up his own title by the ac-

Sept. 1902.]

Syllabus.

ception of a trust in ignorance of his own title or through mistake. We think appellant is entitled to have the issues of fact here involved determined by a jury.

The case is therefore reversed, and the cause remanded, with instructions to grant a jury trial.

REAVIS, C. J., and FULLERTON, ANDERS, WHITE, DUNBAR and MOUNT, JJ., concur.

[No. 4014. Decided September 17, 1902.]

In the Matter of the Estate of ELIZA J. MURPHY, Deceased: JOHN MILLER MURPHY, Appellant.

30	9
630	55
30	9
39	214

DECEDENT'S ESTATE — ALLOWANCE FOR FAMILY SUPPORT — NUNC PRO TUNC ORDER.

Upon the hearing of objections made to an *ex parte* allowance for the support of minor children, it is within the power of the court to make a *nunc pro tunc* order covering the same items included in the original order, where there has been due notice given of such subsequent hearing, and the items are proper ones for allowance under the law.

SAME — RIGHT OF FATHER TO ALLOWANCE.

Under Bal. Code, § 6220, which provides that upon the death of the husband the court shall set apart for the use of the widow and minor children all the property of the estate exempt from execution, and, if this is insufficient for the support of the widow and minor children, the court shall make such further reasonable allowance out of the estate as may be necessary for the maintenance of the family during the settlement of the estate, a surviving husband is as much entitled to an allowance for the maintenance of minor children as the widow would be.

SAME — FUNERAL EXPENSES OF MINOR CHILD.

Physician's charges and funeral expenses incurred for the benefit of minor children are properly allowable as a part of the family allowance.

SAME — FUNERAL AND MEDICAL EXPENSES OF ADULT CHILD — WHEN ALLOWABLE OUT OF ESTATE.

Where the expenses of an adult child's last sickness and funer-

al have been paid by a father from his personal funds, he is entitled to reimbursement from such child's distributive share of its mother's estate, prior to any disposition thereof other than application toward the debts of the estate.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Reversed.

George C. Israel, for appellant.

J. W. Robinson and *W. I. Agnew*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This is an appeal from a refusal of the superior court to make certain allowances upon the hearing of the final account of an administrator. Appellant had formerly been administrator for an estate consisting in large part, if not as a whole, of community property, which belonged to himself and his deceased wife at the time of her death. He was succeeded as administrator by another, and this controversy arises over the settlement of certain items in connection with appellant's final account. At the time of the wife's death certain minor children of the marriage were living with the parents as members of the family, and these children continued to reside with the father after the mother's death. The mother died November 3, 1895, and in May, 1897, on the application of appellant showing that as the surviving husband of the deceased and as father of the minor children he had maintained the household and paid family expense since the death of his wife, and that the sum of \$50 per month had been so expended by him for that purpose, it was ordered by the Honorable Charles H. Ayer, the then judge of said court, that said sum should be allowed as a family allowance, aggregating in all the sum of \$850. This controversy now arises under objections to said allowance. The

Sept. 1902.] Opinion of the Court—HADLEY, J.

objections are based upon the alleged grounds that the court was without authority, by statute or otherwise, to make such order; that the order was *ex parte*, made without notice, and contrary to law. That the order was made without notice appears to be true, but at the hearing of these objections, which was after due notice, it was insisted by appellant that a *nunc pro tunc* order should be made covering the same items included in the former order. Such an order would have been proper if the items were proper ones for allowance under the law. The court, however, declined to make the order on the ground that there is no authority in law to make such an allowance to a family upon the death of the mother. The statute upon the subject of family allowance is found in § 6220, Bal. Code, and is as follows:

"In the case of the appointment of an executor or administrator upon the death of the husband, as mentioned in the last preceding section, the court shall, without cost to the widow, minor child or children, set apart, for the use of such widow, minor child or children, all the property of the estate by law exempt from execution; if the amount thus exempt be insufficient for the support of the widow and minor child or children the court shall make such further reasonable allowance out of the estate as may be necessary for the maintenance of the family according to their circumstances, during the progress of the settlement of the estate."

It will be observed that the only conditions literally stated by the statute as the basis of such allowance are the death of the husband, and the existence of a widow or minor child or children, or both. It is argued that the statute authorizes such an allowance only upon the death of the husband and father, and that in case of the death of the wife and mother no such allowance can be made. A literal reading of the statute seems to warrant the conten-

tion. It should, however, be considered that one of the purposes of the statute is to provide for minor children during the settlement of the estate, and, if this right is denied when the estate is being administered because of the death of the mother, minor children may thus be deprived of a substantial means of existence. The above statute was passed in 1854, when property was held by separate ownership, and when the husband held under his control his entire estate, without administration, after the death of his wife. There existed no necessity for an allowance in favor of the husband, since the estate was in his hands and could be used for the benefit of minor children. Upon the death of the husband, however, the wife succeeded to a dower interest only, and such an allowance became a necessity to her for the immediate support of herself and children. Upon the adoption of our community property law conditions were materially changed. The community estate must pass into the hands of the administrator upon the death of either spouse. More frequently than otherwise, the community property is all that is possessed by either one, and in such case, when the administrator takes charge upon the death of a wife, if no allowance can be made in favor of the family, the children are thus deprived of the protection which was intended by the statute. The welfare of the minor children being the thing in view, we think this statute must be construed in connection with the later community property laws in such a way as will secure to minor children the protection originally intended. We therefore hold that the power exists to make an allowance in favor of the family for the benefit of minor children upon the death of the wife and mother, and the necessary expense of maintaining the household for their benefit "according to their circumstances" is a proper allowance under the statute. We think

Sept. 1902.] Opinion of the Court—HADLEY, J.

the family entitled to the benefit of the statute consists of the father and minor children only, and that other persons who may be living as members of the family are not included therein. The statute does not seem to be susceptible of any other construction, since minor children only are mentioned. This rule may seem to be a harsh one in some instances, as in the case at bar, where adult and invalid daughters were living as members of the family; but the statute extends the favor of such an allowance to minor, and not to adult, children. We think the court should now enter a *nunc pro tunc* order allowing as much of the sum covered by the original allowance as is included in the interpretation given to the statute by this opinion.

It is further assigned that the court erred in refusing to allow certain items paid by appellant as physician's charges and funeral expenses on account of the last illness and death of his daughters, who lived with him in his family during their illness and at the time of their death. Such of these items as were reasonably expended for the benefit of minor children, and which accrued during minority, should be allowed as a part of the family allowance. The other items, under the circumstances, are proper charges, respectively against the distributive shares of the estate coming to the adult children, but subject to the debts of the estate. Those children have no estate from which the items can be paid until the present estate is settled and their distributive shares are ready to be apportioned. The court should see that appellant is paid the amount of these items from such distributive shares, if there be such, at the final settlement of the estate. This is proper because of the nature of the expenditures, being such as are first charges against the respective estates of the children for whom they are made; and, since they were advanced by appellant at a time when humanity demanded

it, we think he should be reimbursed before the distributive shares are otherwise distributed.

The judgment is reversed, and the cause remanded, with instructions to the lower court to proceed in accordance with this opinion.

REAVIS, C. J., FULLERTON, WHITE, MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4283. Decided September 17, 1902.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLIE ANDERSON, *Appellant*.

HOMICIDE — INFORMATION — DESCRIPTION OF WEAPON — VARIANCE.

Proof that a murder was committed with a cigar cutter, under an information charging the killing as done "with an iron instrument," does not constitute a variance, when the cigar cutter was an iron instrument.

SAME.

An information charging defendant with killing another "with an iron instrument, then and there a deadly weapon," though general in its description of the weapon, is good against an objection made after verdict.

SAME — TIME OF COMMISSION OF OFFENSE.

It is not a fatal variance to fail to prove that the crime was committed on the particular day alleged in the information, but, under Bal. Code, § 6845, it is sufficient if it be proved to have been committed within the time in which an action may be commenced on account thereof.

SAME — EVIDENCE.

In a prosecution for murder, it was not error to refuse to permit a witness to state what he understood was meant by a remark made by the deceased just before the altercation in which he was killed, inasmuch as the understanding of the witness as to its import was immaterial.

Sept. 1902.] Opinion of the Court—FULLERTON, J.

REQUESTED INSTRUCTIONS — HARMLESS ERROR.

A judge is not required to give requested instructions in the language of the party requesting them, however pertinent such language may be, but may instruct upon such points in his own language.

Appeal from Superior Court, King County.—Hon. ARTHUR E. GRIFFIN, Judge. Affirmed.

John F. Dore and James J. McCafferty, for appellant.

Walter S. Fulton, Prosecuting Attorney, and *Vince H. Faben*, for the State.

The opinion of the court was delivered by

FULLERTON, J.—The appellant was informed against for murder in the second degree, convicted of manslaughter, and sentenced to imprisonment in the penitentiary for a term of ten years. From the judgment of conviction, he appeals.

The charge in the information is that the appellant "did kill and murder one John Elms with an iron instrument, then and there a deadly weapon, which," etc. The proof was that the instrument used was a cigar cutter. It is said that there is such a variance between the pleadings and proof as to require a reversal. We do not think so. The instrument itself was introduced in evidence, and was before the jury. An inspection of it certainly shows it to be an iron instrument, and whether or not it was a deadly weapon depended upon the manner in which it was used. This latter was a question for the jury, to be determined from all the facts and circumstances of the case, and was properly submitted to them by the court in its instructions. The description of the instrument in the information, while general, is good against an objection

made after verdict. 2 Bishop, New Criminal Procedure, § 64, subd. 2.

It was alleged in the information that the assault was made and that the death therefrom occurred on the 12th day of May, 1901. The evidence disclosed that the assault was made on the 11th of May, 1901, and that the death occurred on the 14th of May following. The appellant argues that he had a right, under the constitution and laws of the state, to prepare a defense that would result in his vindication and acquittal, and that he did this when he was able to show and did show that the deceased was alive after the day on which he was alleged to have been killed, and that the court erred in refusing to direct a verdict of acquittal when this fact was made to appear. But the gravamen of the charge of murder in the second degree is that the accused purposely and maliciously killed another, not that he killed him on any particular day. The allegation of time in an information is usually material only in so far as the statute of limitations is concerned; hence it is generally held, even in the absence of a statute on the subject, that it is not a fatal variance to fail to prove that the crime was committed on the particular day alleged in the information, but that it is sufficient to prove it to have been committed within the time in which an action may be commenced therefor. In this state this is made the rule by statute. Bal. Code, § 6845. We find no merit in this objection.

A witness for the appellant, while testifying to the occurrences immediately preceding the time the deceased was struck with the cigar cutter, testified in part as follows: "Well, I was standing up there drinking a glass of beer when them three fellows came in—Fred Anderson and Charlie Anderson and Johnson—and Johnson asked for a glass of beer, and Johnnie Elms says, 'Have you got

Sept. 1902.] Opinion of the Court—FULLETON, J.

any money?' and Johnson said, 'No'; 'Well,' he says, 'No money, no beer'; said, 'Clubs is trumps in this house.' Further on he was asked, "What did you understand him to mean when he said to Charlie Anderson, 'Clubs are trumps here'?" To this question an objection was interposed and sustained, and the ruling assigned as error. The appellant argues that this expression was susceptible of more than one meaning, and that it was competent for him to show what the appellant, the deceased, and others present understood it to mean when used by the deceased. Doubtless this is the general rule, and, had the question been more directly upon the point, it might have been reversible error to have excluded it,—a question, however, not necessary to be determined here. But the question was directed to the witness' understanding, not to the understanding of the person by whom it was used or to whom it was directed. What the witness understood it to mean was not material. The inference that the others might have understood it in the same way was, to say the least, very remote, and we fail to see how an answer to the question could have in any way aided the jury.

The remaining exceptions go to the refusal of the court to give certain requested instructions. An inspection of the general charge of the court, however, shows that all that was material in the requested instructions was covered by the general charge. This was sufficient. Under the rule in this state, a judge is not required to give a requested instruction in the language of the party requesting it, however pertinent such language may be, but may instruct upon the requested points in his own language; and, if he sufficiently covers the points included within the requested instructions, error cannot be predicated thereon. *State v. Murphy*, 13 Wash. 229 (43 Pac. 44); *State*

Opinion of the Court—DUNBAR, J. [30 Wash.

v. Cushing, 17 Wash. 544 (50 Pac. 512); *State v. Klein*, 19 Wash. 368 (53 Pac. 364).

The judgment is affirmed.

REAVIS, C. J., and DUNBAR, HADLEY, WHITE, ANDERS and MOUNT, JJ., concur.

[No. 4270. Decided September 17, 1902.]

ISAIAH SMITH *et ux.*, Respondents, v. CHARLES VEYSEY *et ux.*, Appellants.

30 18
38 634

HOMESTEAD — CANCELLATION OF SHERIFF'S SALE — EVIDENCE.

In an action to set aside a sheriff's sale of real estate on the ground that it was exempt as a homestead, the admission of evidence as to residence thereon after the filing of the declaration of homestead would not constitute error, where such evidence was a part of the testimony showing residence on the land at the time of and prior to the declaration, was restricted to a period of four months just preceding and following the filing of the declaration, and was introduced merely for the purpose of showing *bona fide* residence.

SAME — ADMISSIBILITY OF ORIGINAL DECLARATION.

The admission in evidence of the original declaration of homestead instead of a certified copy thereof was not error, where it contained the indorsement of the county auditor showing the date of its filing and its entry of record.

Appeal from Superior Court, Chehalis County.—Hon. MASON LEWIN, Judge. Affirmed.

W. H. Abel and A. M. Abel, for appellants.

Bush & Fox, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal taken from a decree rendered in the superior court of Chehalis county, cancelling

Sept. 1902.] Opinion of the Court—DUNBAR, J.

a sheriff's sale of real estate, on the ground that the land constituted a homestead of respondents, and was exempt from sale on execution. The errors assigned are as follows: (1) In admitting evidence as to the residence of respondents on the land after the date of the alleged filing of the declaration of homestead; (2) in admitting the alleged declaration of homestead in evidence; (3) in making findings of fact numbered 3 and 6, because the same were not supported by the evidence, and in refusing to make proposed findings of fact numbered 1, 2, and 3; (4) in adopting conclusions of law numbered 1, 2, and 3, and refusing to adopt appellant's proposed conclusions numbered 1, 2, and 3.

With reference to the first assignment of error, the evidence of respondents with regard to the residence was confined to the time between November 24, 1900, and March 23, 1901, and the declaration of homestead was filed February 8, 1901; so that the time of residence testified to, it will be seen, was immediately before, at the time of, and immediately after, the filing of the declaration. A less time would scarcely show a good-faith residence, and we think the time testified to was competent to show that the residence claimed to have been made was *bona fide*, and no error was committed in its admission. The second contention, that the court erred in admitting the original declaration of homestead, instead of a certified copy thereof, cannot be sustained, under the rule announced by this court in *Fairhaven Land Company v. Jordan*, 5 Wash. 729 (32 Pac. 729), and *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467 (36 Pac. 463).

An examination of the record does not convince us that the findings of fact made by the court are not sustained

Opinion of the Court—DUNBAR, J. [30 Wash.

by the evidence, and we think the conclusions of law legitimately follow from the findings of fact.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON, HADLEY, ANDERS, WHITE and MOUNT, JJ., concur.

[No. 4286. Decided September 17, 1902.]

M. J. ADAMS, as Assignee, Appellant, v. NATIONAL BANK OF COMMERCE, Respondent.

EXECUTION — LEVY ON MONEY — SATISFACTION OF JUDGMENT — MONEY WITHHELD BY AGREEMENT OF PARTIES — LIABILITY OF DEBTOR FOR INTEREST.

A levy of execution upon money constitutes a satisfaction of the judgment, though not paid over by the sheriff until the determination of another suit, where it was stipulated by the judgment creditor that it should be held by the sheriff to abide the result thereof; and in such case the judgment creditor would not be entitled to the issuance of an alias execution for the purpose of recovering interest on the sum the sheriff had been withholding.

Appeal from Superior Court, Pierce County.—Hon. THAD HUSTON, Judge. Affirmed.

T. O. Abbott, for appellant.

Bogle & Richardson and *Bates & Murray*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—Briefly stated, on September 19, 1900, an execution was issued on a judgment theretofore obtained in this cause, and the sheriff, by virtue of said execution, levied upon and took into his possession from the respondent the sum of \$3,742.92 in gold and silver money and

Sept. 1902.] Opinion of the Court—DUNBAR, J.

fractional coins. This amount lacked forty-four cents of being the full amount of the judgment. Said sum of forty-four cents was afterwards paid by the clerk to the respondent as soon as the deficiency was ascertained. Inasmuch as the levy was upon money, the formality of a sale was deemed unnecessary. At the date of said levy and collection by the sheriff there was a suit pending in the name of William H. Opie, as administrator of the estate of T. B. Deming, deceased, against The Pacific Investment Co. *et al.*, to secure the avails of said judgment; and, in order to determine to whom the money should be paid, it was stipulated that the said money which had been levied upon by the sheriff should remain in the hands of the sheriff until said suit of Opie *v.* The Pacific Investment Co. had been determined. That case was tried, appealed to this court, and a judgment rendered by the court determining the ownership of the funds in the hands of the sheriff. The sheriff made a return on the execution aforesaid, on the 20th day of January, 1902. Thereupon appellant ordered an alias execution to collect from the respondent interest upon the amount of money that had remained in the hands of the sheriff from the time of the levy until the time it was paid to the clerk. A motion was made by the respondent to quash this alias execution, which motion was sustained by the court, and from the judgment of the court in that regard this appeal is taken. So that the question presented here is whether the collection of the judgment from the judgment debtor satisfied the judgment or not, and whether, when the money levied upon and collected had failed to reach the judgment creditor, the judgment debtor was responsible for the period of delay between the collection of the money and the return thereof by the sheriff for the benefit of the judgment creditor.

It is insisted by the appellant that the payment of the money constituted only a *prima facie* satisfaction of the judgment, which may be rebutted; that if it can be shown that there was no actual satisfaction of the judgment, or the satisfaction was prevented by some act of the judgment debtor himself, or for his benefit, there would be no satisfaction; and that an alias execution may be issued to satisfy the judgment; while it is contended by the respondent that, inasmuch as money sufficient to satisfy the judgment had been wrested from it, and appropriated by the sheriff to apply on the judgment, the power of the respondent over the money had ceased; that after the money passed into the hands of the sheriff, the sheriff was the agent of the judgment creditor, and that, if it did not reach the judgment creditor, it was no concern of the judgment debtor; that as soon as the sheriff receives the money the law makes the application, and it is a satisfaction of a judgment; and that such money in the sheriff's hands is held for the use of the judgment creditor or his assignee. It is also contended by the respondent that, in any event, the appellant has not sought the proper remedy; that he cannot secure redress by an execution, but that it must be secured by due process of law by an action on the case, where the respondent may have an opportunity to be heard respecting the justice of the judgment sought, and where the questions which are determinative of the rights of the parties may be contested. Passing over this proposition of the particular remedy sought, we are of the opinion that the record does not disclose a case where the interest could be secured by the appellant in any event. Many cases are cited by both respondent and appellant, but the law seems to be clear and well established. The difficulty is in making an application of the law to the facts involved. The consensus of judicial opin-

Sept. 1902.] Opinion of the Court—DUNBAR, J.

ion is stated in 11 Am. & Eng. Enc. Law (2d ed.), p. 704, as follows:

"In some of the cases it has been said broadly that the levy of an execution on sufficient personal property to satisfy it operates *per se* as a satisfaction, and that it discharges the judgment. Generally, however, the courts have not meant by this that there is an absolute satisfaction in all cases merely by virtue of the levy, and under all circumstances; and if they have intended to go so far the cases cannot now be regarded as authority. A levy is only *prima facie* evidence of a satisfaction, or, as it is sometimes said, there is a satisfaction *sub modo* only; and it is well settled that the presumption may be rebutted."

And under the title of "Circumstances Rebutting Presumption" the same author says:

"It may be laid down as a general rule that the presumption of satisfaction arising from a levy of personal property is rebutted, as far as the defendant is concerned, by proof that the plaintiff has been prevented by the act of the defendant or the operation of law from reaping the fruits of his levy; or, generally, by showing that for any other reason not due to the fault of the officer or himself, there had been no actual satisfaction."

We think undoubtedly the text quoted states the law correctly, and, applying that law to the facts of this case, we do not think that there is any proof that the appellant has been prevented by the act of the respondent or the operation of law from obtaining the fruits of his levy, or that there was any reason, not due to the fault of the appellant, why the judgment was not satisfied, for the simple reason that the appellant, through its attorneys, stipulated that the money levied upon should be held in the hands of the officer until the case of *Opie v. Pacific Investment Co.*, *supra*, was decided. This appears plainly from the affidavit of the judge before whom the proceedings were had. The affidavit is as follows:

"STATE OF WASHINGTON, } ss.
County of Pierce, }

"I, Thomas Carroll, being first duly sworn, do on oath depose and say: That on the 17th day of September, 1900, I was one of the judges of the above entitled court; that Mr. Walter Christian, as attorney for the above named plaintiff, requested me to make an order in the above entitled cause, directing the sheriff to make an immediate return of a writ of execution issued in said cause, and upon which he had obtained a sum of money in gold and silver coin, from the defendant, National Bank of Commerce; that the ground upon which order was requested was that it was, under the laws, necessary for the sheriff to sell personal property seized by him under execution, and that the personal property in this instance being lawful money of the United States, a sale of the same would be a useless expense; that I signed an order as requested, and delivered the same to said Christian; that subsequently, within a very few minutes, Mr. Charles Richardson and Mr. C. A. Murray, as attorneys for the National Bank of Commerce, came to my chambers and requested me to withhold said order until an application could be made for an injunction to try the title to said personal property in that certain case entitled '*W. H. Opie v. Pacific Investment Company et al.*', number 17,899, in the above entitled court; that I immediately sent word to Mr. Christian to withhold said order and come to my chambers at once for consultation regarding the same; that during said consultation it was stated by said Christian and T. O. Abbott, as the attorneys for the plaintiff herein, that they were anxious to try the issues in said cause at once; and it was thereupon agreed that said cause should be taken up, and the merits thereof disposed of, and in the meantime, that the said order to the sheriff to make immediate returns should be withheld; that it was thereupon agreed, between all the parties present, that said cause should proceed to trial at once, and in the meantime, that the personal property referred to as the proceeds of said writ should be withheld by the sheriff, pending the further order of the court, as though an in-

Sept. 1902.]

Syllabus.

junction had been issued herein; that the reason I make this affidavit is, that the records do not disclose any facts relative to the order hereinbefore referred to, as having been signed and delivered to said Christian.

(Signed "THOMAS CARROLL.")

Neither does the affidavit of Christian or the extensive affidavit of T. O. Abbott in any manner tend to contradict the affidavit of the judge, all showing that the stipulation was entered into as indicated. Even if it should be true, as stated on information and belief in the affidavit of Abbott, that the case of Opie *v.* Pacific Investment Co. was prosecuted in the interest of the respondent, yet the attorneys for the appellant saw fit to make a stipulation that the satisfaction of the judgment should await the determination of that case. There is no showing in this record that the cause of Opie *v.* Pacific Investment Company was unduly delayed through the instrumentality of the respondent, nor is there any showing that at any time after the stipulation was entered into there was any demand made by the attorneys for the appellant that the money should be appropriated upon the judgment, or that the stipulation should be avoided.

The judgment is affirmed.

REAVIS, C. J., and WHITE, MOUNT, HADLEY, FULLERTON and ANDERS, JJ., concur

[No. 4291. Decided September 17, 1902.]

DOA ROBERTS *et al.*, Respondents, v. PORT BLAKELY
MILL COMPANY, Appellant.

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30	348
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33	89
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37	322
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41	210

NEGLIGENCE — DEFECTIVE RAILWAY CARS — ACTION FOR INJURIES —
NONSUIT.

In an action for the death of a conductor of a logging train, caused by the derailing of the train, refusal of a nonsuit was

proper, where the evidence showed that the train was loaded as usual, was traveling at the usual rate of speed, and that the track was not out of order; that the flanges on some of the car wheels were too thin to be safe, had flaws in them, and that they broke at the time of the accident; that such condition of the flanges make a car unsafe and dangerous, especially when striking a curve; that a reasonable and ordinary inspection would have discovered the defect, and that the derailing of the cars occurred while the train was rounding a curve.

SAME — EVIDENCE — ADMISSIBILITY OF BROKEN CAR WHEELS.

Where it was claimed that the derailing of a train was caused by the breaking of wheel flanges on some of the cars it was not error to permit the introduction in evidence of a broken flange picked up by a witness several months afterwards at the place of the accident, when he had testified to being on the train at the time of the accident and to having gathered up a number of broken pieces of flanges and placed them in a heap, and that the piece offered in evidence was picked up in that vicinity and resembled some of them, though he could not identify it.

SAME — RES GESTAE — DECLARATIONS OF VICE PRINCIPAL.

The declarations of a general superintendent of a railway made on the scene of a train wreck within three hours after it occurred, and tending to explain or account for the same, are admissible in evidence as part of the *res gestae*.

INSTRUCTIONS — CONSTRUCTION AS A WHOLE.

Although an isolated portion of an instruction standing alone may be technically erroneous, yet it will be upheld, if the whole instruction, taken together, fairly states the law.

SAME — REFUSAL OF REQUESTED INSTRUCTIONS.

The refusal of the court to give a general definition of negligence as requested by defendant is not error, where the court has correctly instructed the jury upon the specific negligence under consideration.

SAME.

Where the court by its instructions has thoroughly impressed upon the jury that the burden was upon plaintiffs to establish negligence and that the jury must find by a preponderance of the evidence that it was the defendant's negligence which caused the injury, it was not error to refuse a requested instruction to the effect that negligence is never presumed, and that it was not the duty of defendant to explain how the accident occurred, or to show that defendant was not negligent.

Sept. 1902.] Opinion of the Court—MOUNT, J.

SAME.

The refusal of the court to give a requested instruction concerning circumstantial evidence was not error, where there was some circumstantial evidence introduced, but the case did not rest upon that character of proof.

SAME.

The refusal of requested instructions is not error, when those given cover the same ground.

Appeal from Superior Court, Mason County.—Hon. MASON IRWIN, Judge. Affirmed.

S. P. Richardson and Preston, Carr & Gilman, for appellant.

Troy & Falknor, for respondents.

The opinion of the court was delivered by

MOUNT, J.—The respondent Dora Roberts is the widow, and Lillie Roberts and Hiram Roberts are the minor children, of Warren Roberts, deceased. In his lifetime Warren Roberts was in the employ of the appellant as a conductor on a logging railroad operated by it in Mason county, in this state. This road was a standard gauge railroad, equipped with standard locomotive and with logging trucks, and was operated for the purpose of transporting saw logs from the forest where they were cut to tidewater. The road consisted of three sections,—the first section extending from the forest where the logs were cut to a station called "Matlock"; the second, from Matlock to a station called "26", and the third from 26 to a station called "New Kamilchie", at tidewater. On the 15th day of October, 1900, the said Roberts had charge of a train which was running from 26 to New Kamilchie. This train consisted of a locomotive and seventeen cars of logging trucks, loaded with saw logs. The train, which was running at the usual rate of speed, in rounding a

curve was derailed, and Roberts was thrown from his position on the train to the ground and instantly killed. This suit was brought by his widow and minor children to recover damages for the loss of the husband and father; it being claimed that the train was derailed through the negligence of the defendant in failing to provide safe and suitable cars in this: That the flanges upon the wheels of the cars had become worn, and contained flaws which could have been discovered by reasonable inspection, and that one or more of these flanges broke, causing the train to leave the track, thereby causing the death of Warren Roberts. The cause was tried before the lower court and a jury. A verdict was rendered in favor of the plaintiffs for the sum of \$4,000. From a judgment on the verdict, defendant appeals.

Errors of the trial court are alleged substantially as follows: (1) In denying defendant's motion for a non-suit at the close of plaintiffs' evidence; (2) in denying defendant's motion for a new trial; (3) in admitting in evidence a broken piece of flange picked up at the place of the accident several months thereafter; (4) in admitting in evidence the statement of George Tew, defendant's superintendent, made three or four hours after the accident; (5) in instructions given to the jury; and (6) in refusing to give to the jury certain instructions requested by defendant.

1. We think the motion for a non-suit was properly denied. The plaintiffs' evidence showed that the train was loaded as usual, and was traveling at the usual rate of speed, and that the track was not out of order. It also shows that flanges on some of the car wheels were too thin to be safe, and had flaws in them, and that they broke at the time of the accident, and left marks and indentations on the rails where the cars left the track; that such condi-

Sept. 1902.] Opinion of the Court—MOUNT, J.

tion of the flanges makes a car unsafe and dangerous, especially when rounding a curve; that a reasonable and ordinary inspection would have discovered the defect; and that the wreck occurred while rounding a curve. Here was sufficient cause for the accident. Conditions existed which rendered the operation of the train dangerous. The train was being properly operated. When the defective wheels struck the curve, they gave way and left the rail. It was the natural result. No other cause of the accident was shown or intimated by plaintiffs' evidence, nor in the subsequent evidence of appellant. This court said, in *Walker v. McNeill*, 17 Wash. 582 (50 Pac. 518):

"Whenever a car or train leaves the track it proves that either the track or machinery or some portion thereof is not in proper condition, or that the machinery is not properly operated."

The evidence here showed that the track was in order; that the train was properly operated; that the machinery was defective, and was liable to, and did leave the track upon a curve; and that a reasonable inspection would have discovered the defect. There was but one cause shown for the accident, and for that cause the defendant is liable.

It is argued by appellant that the entire case is one of surmises and conjectures, that the accident may have been caused by a rock or obstruction on the track or the letting off the brakes before the accident, or that there was some latent defect which no inspection could have discovered, or that a sound and sufficient wheel broke or left the rail; and the rule is invoked that "where the evidence establishes to a certainty that the accident resulted from one of two or more causes, for one or more of which the defendant would be responsible, and for one or more of which he would not be responsible, a verdict for the plaintiffs cannot be sustained." The trouble with this position

is, that the evidence does not show, nor is there any attempt to show, any other cause than the one above named. We think the rule laid down by the court in *Walker v. McNeill*, *supra*, is conclusive in this case. In *Walker v. McNeill* the ties of the roadbed were rotten, and when the derailed wheels struck them they broke in two. They were so decayed that they would not hold spikes, and the rails spread. In the case at bar the flanges of the car wheels were worn and dangerous. They contained flaws, and, when rounding a curve, were liable to, and did, leave the track. There is no distinction in principle between the two cases. The same argument used in this case for a reversal would have been applicable in that case. It does not apply to either for the same reason, viz., that there was but *one cause shown for the accident*, and for that cause defendant was liable.

2. The argument in support of the error assigned in denying the motion for a new trial is based upon the evidence of defendant. Defendant's witnesses testified in substance that the car wheels used were of approved and standard manufacture; that the cars were regularly and frequently inspected, and no defects were found; that all the flanges used were of sufficient strength; that the wheels broken in the wreck were sound and free from flaws; that the deceased conductor had full charge of the road and appliances on his run; that it was a part of his duty to look after the cars and keep them in order. The effect of this evidence was to negative the evidence of the plaintiffs, and, if true, it shows contributory negligence on the part of the deceased. This made a question of fact for the jury. After a careful reading of all the evidence, we think there was sufficient contradictory evidence on all the points named to go to the jury, and it was for the jury to weigh the same and determine the truth.

Sept. 1902.] Opinion of the Court—MOUNT, J.

3. The court permitted plaintiffs to introduce in evidence a piece of broken flange picked up at the place of the wreck some six months after it occurred. One of the witnesses, who was a brakeman on the train at the time of the wreck, testified substantially that when the wreck occurred he was on the rear end of the train; that he jumped off, and in a few minutes thereafter went forward to the place where the wrecked cars were piled up; that he saw and examined several pieces of broken flange; that these broken pieces had flaws in them and were thin; that he saw the wheels with the flanges broken off; that he piled up the pieces; that about six months afterwards he went back to the place of the wreck with one of the plaintiffs' attorneys, and near where the wreck occurred picked up the piece offered in evidence. He was not able to identify this particular piece as one which he had seen there at the time of the wreck, but said: "It was very similar to that in size and heft." . . . There were some longer, and some shorter, and some broken in different ways. . . . Q. "Were there some that appeared to be like this?" A. "Yes, sir." We think, under this evidence, that the piece of flange was entitled to go to the jury, as the court in admitting it said, "for what it was worth;" that is, the jury had a right to determine whether it was or was not a piece of the flange which was broken from a car wheel at the time of the wreck. *State v. Cushing*, 17 Wash. 544, 558 (50 Pac. 512); *King v. New York Central, etc., R. R. Co.*, 72 N. Y. 607. Furthermore, we think the piece exhibited was competent as illustrative of the pieces which he had examined at the time of the accident upon the principle that a drawing or model or photograph is admissible to explain oral evidence, in order that the jury may under-

stand and apply the oral evidence in connection therewith.

4. Two of plaintiffs' witnesses were permitted over defendant's objection to testify to certain statements made by George Tew, who was general superintendent and had the direction and management of the railroad. Mr. Tew arrived at the scene of the wreck about three hours after it occurred. Soon after his arrival he was examining the same. One of the witnesses testified: "I heard him say—he was looking at the flanges, and he said, if the company use any more Tacoma wheels, he would not work any longer for them." Another testified that Mr. Tew at the same time and place said: "This puts me in a devil of a fix, and I can't be putting new wheels under the cars all the time." We think these declarations were admissible, under the rule stated by Mr. Jones on the Law of Evidence, § 360, a part of which is as follows:

"On the same principle reports to the general manager of a railway company concerning the circumstances and results of an accident, and also as to who was to blame therefor, made by the superintendent and conductor several days after the event, are incompetent. But, as we have already pointed out, there is a class of cases in which the rule that the declaration must be contemporaneous with the act is construed less strictly; and in which such declarations are admitted, although *not technically contemporaneous*, if they are spontaneous and tend to explain the transaction, and if so slight an interval of time has elapsed as to render premeditation improbable. Accordingly in numerous cases the declarations of employees and agents, made soon after an accident, have been received as part of the *res gestae*." Mechem, Agency, § 715; McKelvey, Evidence, p. 280; 1 Taylor, Evidence, p. 519; *Keyser v. Chicago & G. T. Ry. Co.*, 66 Mich. 390 (33 N. W. 867); *Hooker v. Chicago, etc., Ry. Co.* 76 Wis. 542 (44 N. W. 1085); *O'Connor v. Chicago, M. & St. P. Ry.*

Sept. 1902.] Opinion of the Court—MOUNT, J.

Co., 27 Minn. 166 (6 N. W. 481, 38 Am. Rep. 288); *Ohio & M. Ry. Co. v. Stein*, 133 Ind. 254, 255 (31 N. E. 180, 19 L. R. A. 733); *New York & C. M. S. & Co. v. Rogers*, 11 Colo. 6 (16 Pac. 719, 7 Am. St. Rep. 198); *People v. Vernon*, 35 Cal. 49 (95 Am. Dec. 49); *Hall v. Union Central Life Ins. Co.*, 23 Wash. 610 (63 Pac. 505, 51 L. R. A. 288).

The declarations of Mr. Tew were not the narration of a past event, but were the natural declarations growing out of the event, and were so nearly contemporaneous with the accident as to be held to be in the presence of it, and were made under such circumstances as necessarily to exclude the idea of design or deliberation. They were made by one having the control and management of the road. Under these circumstances we think the declarations were admissible.

5. The court instructed the jury as follows:

“The burden is upon the plaintiffs to establish that the death of the deceased was caused by the negligence of the defendant, and if you find that his death was not due to the negligence of the defendant, then you need consider nothing further, as your verdict in that case must be for the defendant. The negligence of the defendant company must be established by a preponderance of the evidence; and by a preponderance of the evidence is not meant the greatest number of witnesses, but it means the evidence which is most convincing to your minds.”

It is argued that the sentence, “and, if you find that his death was not due to the negligence of the defendant, then you need consider nothing further, as your verdict in that case must be for the defendant,” was contradictory of the rest of the instruction, and shifted the burden of proof to the defendant. But the whole instruction must be construed together. So construed, it was not error. It is true that this sentence is not technically correct; but this error is not of moment, especially when the intent of the

whole is clearly expressed that the burden is upon the plaintiffs to prove negligence. This court has frequently held that where an isolated portion of an instruction, standing alone may be technically erroneous, yet if the whole instruction, taken together, fairly states the law, it will be upheld. *Seattle Gas, etc., Co. v. Seattle*, 6 Wash. 101 (32 Pac. 1058); *Duggan v. Pacific Boom Co.*, 6 Wash. 593 (34 Pac. 157, 36 Am. St. Rep. 182); *McQuillan v. Seattle*, 13 Wash. 600 (43 Pac. 893); *State v. Surry*, 23 Wash. 655 (63 Pac. 557); *Henry v. Grant Street Electric Ry. Co.*, 24 Wash. 246 (64 Pac. 137); *Miller v. Dumon*, 24 Wash. 648 (64 Pac. 804).

6. It is alleged as error that the court refused to give instruction numbered 2 as requested by defendant. This instruction defined negligence in general terms, as "that said defendant did something or omitted to do something which an ordinarily prudent person under such circumstances would not have done or omitted to do"; but the court specifically instructed the jury as to the duty of the company to provide reasonably safe cars and wheels, and to make reasonable inspection thereof, and also that if the jury found, by a preponderance of the evidence, that the death of the deceased was caused by any defects in the cars or wheels, and that such defects could have been discovered by reasonable inspection, it was liable. We think this was sufficient, and that it was not necessary to give a general definition of negligence, where the jury are correctly instructed upon the specific negligence under consideration.

It is also alleged as error that the court refused to give instruction No. 14 requested by defendant. This instruction is to the effect that negligence is never presumed, but must always be proven, and that it was not the duty of the defendant to explain how the accident occurred, or to

Sept. 1902.] Opinion of the Court—MOUNT, J.

show that it was not negligent. In the instructions given the court repeatedly told the jury that the burden was upon the plaintiffs to establish negligence, and, while the court did not specifically state that it was not the duty of the defendant to explain how the accident occurred, yet we think, in view of the instructions impressing it upon the minds of the jury that they must find by a preponderance of the evidence that the defendant was negligent and that this negligence caused the injury, it was not error to omit the requested instruction.

It is complained that the court refused to give an instruction requested concerning circumstantial evidence. While there was some circumstantial evidence in the case, the case, as we have seen, did not rest upon this evidence, and for that reason it was not error to refuse it.

The errors assigned as ten, eleven and twelve have reference to instructions to the effect that, if the jury find that the accident occurred by reason of a defective car wheel, still the jury must find that the defect was one which was known, or ought to have been known, to the defendant, and that if the defect was latent, or if the wheel was of standard manufacture and of a kind proven safe, even though it contained a flaw which could not have been discovered by proper carefulness, then the defendant would not be liable. Upon these questions the court told the jury:

“If, therefore, you find from a preponderance of the evidence that the accident which caused the death of the deceased was due to any defect in any wheel or wheels of defendant’s cars by the flanges being worn down too thin, or to any flaw or break in the flanges, and that such defect, if any, existed, could have been discovered by reasonably careful inspection of the wheels, and that defendant failed to make such inspection, then your verdict should be for the plaintiffs.”

"The company is not required to guard against defects which cannot be discovered by reasonable care, but they are required to discover defects which can be disclosed by reasonably careful inspection."

"The master is bound to use appliances which are not defective in construction; but as between him and his employees he is not bound to use such as are the best or most approved description, if they are such as are in general use, that is all that is required. The employer is bound to furnish machinery and appliances that are of ordinary character and of reasonable safety. Whatever is according to the general, usual, and ordinary course adopted by those in the same business is reasonably safe within the meaning of the law."

We think these instructions as given covered the instructions requested, and were as favorable to the defendant as it was entitled to. Upon the whole, we think the instructions given fairly stated the law of the case, and that there was no substantial error in the trial.

The judgment will, therefore, be affirmed.

REAVIS, C. J., and FULLERTON, DUNBAR, HADLEY,
WHITE and ANDERS, JJ., concur.

OLIVER STEWIN *et al.*, *Appellants*, v. MINNIE THRIFT,
Administratrix, Respondent.

HOMESTEAD — RIGHT OF MINOR CHILD TO SELECT.

Where neither the husband in his lifetime, nor the widow after his death, made any selection of a homestead in community realty, a minor child cannot claim one after the death of his parents, as against the other heirs of the community, since Bal. Code, §§ 6219, 6222, which provide for a homestead to the widow and minor children, must be construed in connection with the

Sept. 1902.] Opinion of the Court—FULLERTON, J.

general homestead law, which has superseded the provisions contained in such sections permitting the selection of a homestead to be made by minor children.

SAME—ASSIGNMENT TO MINOR—HARMLESS ERROR.

The denial of a minor's claim to have the use of his mother's portion of community real property assigned to him upon her death, as permitted by Bal. Code, § 5246, will not be reversed, when it appears that at the time of the order he was within sixteen days of the age of majority; and there is no showing that the use of the property for that limited a period would have been of value to him.

DECEDENT'S ESTATE—ALLOWANCE FOR SUPPORT OF MINOR—NECESSITY.

A minor child is entitled to an allowance out of, and not to the whole of, the personal property of his deceased parents, for his support during his minority, and then only upon a showing of necessity therefor.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Affirmed.

Murry & Lueders, for appellants.

Ellis L. Garretson and *Frank A. Luse*, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—In 1899, Charles Hunt and Mary B. Hunt were husband and wife, and as a community were the owners of one hundred and sixty acres of land situated in the county of Pierce, upon which they then resided, and of certain personal property of which they were in possession. On June 3d of the year named Charles Hunt died intestate, leaving him surviving, his widow, Mary B. Hunt, and six children. Of the children, one—the appellant here, Winchester Hunt—was a minor in his nineteenth year, then residing with his father and mother. The others were of adult age, living apart from the parental home. The mother and Winchester Hunt continued to reside upon the land and to retain possession

of the personal property until July 1, 1901, when the mother died intestate. Thereafter Minnie Thrift, a daughter of the decedents, applied for and was granted letters of administration upon their estates; the interests of each of the decedents in the real property being treated as a separate estate, and separate letters of administration being granted therefor. The personal property was inventoried as the property of the deceased wife, Mary B. Hunt. The real property was valued by the appraisers at \$1,500, and the personality at \$213.65. After the return of the inventory and the appraisement thereunder, Winchester Hunt, who was then within a few months of the age of majority, through his guardian, Olive Stewin, applied to the court to have the real property set apart to him as a homestead, and the personality as property not subject to administration, offering in his application to pay the funeral expenses and costs of administration then accrued. This appeal is from the orders denying the application.

The claim of the appellant to the real property is based upon the provisions of the homestead statutes of this state. Those pertinent to the inquiry are the following:

“Section 5237. Homesteads may be selected and claimed in lands and tenements with the improvements thereon, not exceeding in value the sum of two thousand dollars. The premises thus included in the homestead must be actually intended and used for a home for the claimants, and shall not be devoted exclusively to any other purposes.”

“Sec. 5243. In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.

Sept. 1902.] Opinion of the Court—FULLERTON, J.

“Sec. 5244. The declaration of homestead must contain—

1. A statement showing that the person making it is the head of a family; or when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises or has purchased the same for a homestead and intends to reside thereon and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value.

“Sec. 5245. The declaration must be recorded in the office of the auditor of the county in which the land is situated.

“Sec. 5246. From and after the time the declaration is filed for record the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this chapter; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this chapter.”

“Sec. 6219. When a person shall die, leaving a widow, or minor child or children, the widow, child or children, shall be entitled to remain in possession of the homestead, and of all the wearing apparel of the family, and of all the household furniture of the deceased; and if the head of the family in his lifetime had not complied with the provisions of the law relative to the acquisition of a homestead, the widow, or the child or children, may comply with such provisions, and shall be entitled on such compliance to a homestead as now provided by law for the

head of a family, and the same shall be set aside for the use of the widow, child or children, and shall be exempt from all claims for the payment of any debt, whether individual or community. Said homestead shall be for the use and support of said widow, child or children, and shall not be assets in the hands of any administrator or executor for the debts of the deceased, whether individual or community."

"Sec. 6222. When property shall have been set apart for the use of the family, in accordance with the provisions of this chapter, if the deceased shall have left a widow and no minor children, such property shall be the property of the widow; if he shall have left also a minor child or children, one half to the widow, and the remainder to such child, or in equal shares to such children, if there are more than one; if there be no widow, then the whole shall belong to the minor child or children."

It is upon § 6219 that the claim of the appellant is mainly rested. He contends that, inasmuch as no homestead was selected by the father during his lifetime, the right to select vested in the mother on his death, and that, had the land been so selected, title in fee to one half thereof would have vested in his mother and the other half in himself, under the provisions of § 6222; that he thus had a vested right to title in fee to one-half of the land, which could not be defeated by inaction on the part of the mother. Sections 6219 and 6222, standing alone, undoubtedly lend color to this claim. But we said in *Austin v. Clifford*, 24 Wash. 172 (64 Pac. 155), that these sections must be read and construed in connection with the general homestead act of 1895, and, so reading and construing them, it would seem that §§ 6219 and 6222 had been in part superseded by that act. It will be noticed that the tenure by which a homestead is held by the survivor of a community is made to depend upon the nature of the title to the land from which the homestead is se-

Sept. 1902.] Opinion of the Court—FULLETON, J.

lected. If it is selected from community property in the lifetime of both spouses, it vests in the survivor in fee, and becomes his or her separate property; if it is selected from separate property, it goes, on the death of the person from whose property it was selected, to the heirs or devisees of such person, subject to the power of the court to assign it for a limited period to the family of the decedent. Now, § 6219 provides that, if the head of the family in his lifetime had not complied with the provisions of the law relative to the acquisition of a homestead, his widow may comply with such provisions, "and shall be entitled on such compliance to a homestead as now provided by law for the head of the family;" that is to say, if she makes the selection from what was formerly the community property of herself and husband, she takes title thereto in fee, to the exclusion of the children, minors as well as adults; if she selects from her late husband's separate property, she takes a limited estate, the duration of which is fixed by the court having jurisdiction over the estate. *Austin v. Clifford, supra.* In the case before us the property was the community property of the decedents. Had the husband selected a homestead therein prior to his death, or had the wife selected one subsequent to his death, the whole thereof would have vested in fee in the wife, to the exclusion of the minor appellant; and he has, therefore, no vested interest in the title to any part of the lands by reason of the homestead statutes. To state the case in different words: on the death of the father, the land, being community property, passed, under the statute of descents, one-half to the mother as her separate property, and one-half to the children, adults as well as minors, subject to the right of the mother to select a homestead therefrom; and, as the mother failed to exercise this right, the children's portion vested in them in fee at her death,

subject, of course, to the costs of administration and the probable debts against the estate of the father. The interest of the minor in the property, other than his interests as an heir, was the right to have his mother's portion of the property assigned to his use "for a limited period," perhaps during his minority. As it appears, however, that he was within sixteen days of the age of majority at the time the order appealed from was entered, and as it is not shown that the use of the property for this limited period would have been of value to him, we find no cause for reversing the orders because he was denied the use of the property for that time.

We have not overlooked § 6215 of the statute. Aside from the fact that it is doubtful whether this statute is any longer operative in view of certain provisions of the homestead act and the act relating to descents, passed subsequently to its enactment, it has no application here, because its operation is confined in terms to estates of less value than one thousand dollars, while here, according to the appellant's own showing, which is all that appears in the record, this estate was of greater value than one thousand dollars.

We find no error in the order refusing to award the appellant the personal property. At most he was entitled to an allowance therefrom for his support during his minority, and then only upon a showing of necessity therefor. No such showing appears in the record before us.

The orders appealed from are affirmed.

REAVIS, C. J., and DUNBAR, HADLEY, WHITE, ANDERS and MOUNT, JJ., concur.

STATE EX REL. SMELTING CO. v. SUPERIOR COURT. 43

Sept. 1902.] Opinion of the Court—MOUNT, J.

[No. 4349. Decided September 18, 1902.]

THE STATE OF WASHINGTON *on the Relation of Dutch Miller Mining & Smelting Company v. Superior Court of Kittitas County.*

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f31 296
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APPEAL — STATEMENT OF FACTS — MATTERS INCLUDED.

The superior court cannot be compelled to certify a statement of facts covering that part of a case which occurred more than ninety days prior to the date of the filing of the statement, inasmuch as the utmost limit of time within which a statement can be filed is ninety days after the time begins to run within which an appeal may be taken.

SAME — REVIEW OF PRIOR ORDERS.

Although under Bal. Code, § 6500, subd. 7, all prior orders made in a cause are reviewable upon appeal from a final order made after judgment, the review is restricted to such prior orders as were made in the course of the particular proceeding leading up to the final order appealed from, and would not include other orders made in different proceedings in the same action; hence an order denying a motion to vacate a judgment would not be reviewable upon an appeal from a subsequent order denying a like motion for vacation and asking for a rehearing of the original motion.

Original Application for Mandamus.

George D. Farwell, for relator.

Vance & Mitchell, for respondent.

The opinion of the court was delivered by

MOUNT, J.—On November 9, 1901, one J. P. LaCaff brought an action in the superior court of Kittitas county against the Dutch Miller Mining & Smelting Company, and on January 2, 1902, the said court granted a default judgment against the defendant therein, as prayed for in the complaint. On January 7th, following the entry of this judgment, defendant therein filed a motion, sup-

44 STATE EX REL. SMELTING CO. v. SUPERIOR COURT.

Opinion of the Court—MOUNT, J. [30 Wash.

ported by affidavits, to vacate the judgment. This motion was regularly heard and denied by the court on January 16, 1902. On February 24, 1902, the defendant therein filed another motion, and affidavits in support thereof, to vacate and set aside the said judgment, and for a rehearing of the original motion. This motion was overruled on March 24, 1902, and on March 27th the defendant duly served its notice of appeal from each of the orders denying the said motions, and also from the final judgment in the original action, and thereafter perfected said appeal to this court. On June 10, 1902, the said defendant applied to the said superior court for an order extending the time within which to file and serve a proposed statement of facts. This motion was granted, and the time of defendant to file said proposed statement of facts was extended to June 20, 1902. On June 19, 1902, the proposed statement of facts was filed and served. No amendment was offered to this proposed statement of facts, and on July 1, 1902, the defendant applied to the judge of the said court to certify the proposed statement of facts, but said court refused to certify any statement of facts showing proceedings which occurred more than ninety days prior to June 19, 1902, the day the proposed statement of facts was filed. The court, however, was ready and willing to certify a statement of facts embodying all the matters and proceedings had or occurring in said cause at the time of the order denying the last motion, viz., March 24, 1902, and within ninety days prior to the filing of the proposed statement of facts. This is an application by the defendant in that case, as relator here, for a writ requiring the judge to certify the proposed statement of facts.

The question presented is, shall the lower court be compelled to settle and certify a statement of facts which covers the whole case from the beginning up to the order

Sept. 1902.] Opinion of the Court—MOUNT, J.

denying the last motion to vacate the judgment? This court said, in *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31 (67 Pac. 374):

"The utmost limit of time within which a statement can be filed is ninety days after the time begins to run within which an appeal may be taken. If filed after thirty days, it must be done by authority of an order of the court extending the time; but such cannot be extended in any event beyond the ninety day period provided by statute."

See, also, *State v. Seaton*, 26 Wash. 305 (66 Pac. 397); *Wollin v. Smith*, 27 Wash. 349 (67 Pac. 561).

At the time the statement of facts was filed the time for filing a statement of facts upon which the judgment was based, and upon which the order denying the first motion to vacate was based, had long since expired. Clearly, therefore, under the rule announced in *Zindorf Construction Co. v. Western American Co.*, *supra*, the relator had no right to file a statement of facts upon which the judgment of January 2d and the order of January 16, 1902, were based. While it is the duty of the lower court to certify a statement of facts filed within time, and while there is no limit provided within which this duty must be performed, yet where it appears in an application to compel the lower court to settle and certify a statement of facts that such statement has not been filed within time, and that this court, upon motion, would strike the statement for that reason from the record, the lower court will not be required to certify such statement, because it will not be required to do a useless act.

But it is argued by relator that the order overruling the last motion is an appealable order, and that by appealing from this order all prior orders, as well as the one made on March 24, 1902, must be reviewed, under subdivision 7 of § 6500, Bal. Code, which reads as follows:

"Any party aggrieved may appeal . . . From any final order made after judgment, which affects a substantial right; and an appeal from any such order shall also bring up for review any previous order in the same action or proceeding which involves the merits and necessarily affects the order appealed from, in case the record sent up on the appeal, or any supplementary record sent up before the hearing thereof, shall show such previous order sufficiently for the purposes of a review thereof. . . ."

In construing this provision this court, in *Sturgiss v. Dart*, 23 Wash. 244 (62 Pac. 858), said:

"The previous order referred to by the statute must, we think, be one made in the course of the particular proceeding leading up to the final order appealed from, and that it can have no reference to orders made in other and different proceedings which may be appealed from directly or indirectly by an appeal from the final judgment, although made in the same action."

We think the cases above referred to are conclusive of the question before us, and it is unnecessary to review the numerous cases cited in the briefs. It is no doubt true that the statement of facts should include the evidence heard at the time the motion was considered, and upon which the order was made, if filed within time; but it does not follow that the evidence heard upon other motions of the same character, or upon the trial, if there was one, shall also be included. It is admitted here that the court is ready and willing to settle and certify "a statement of facts embodying all the matters and proceedings had or occurring in such cause at the time of denying the amended and supplemental motion for a rehearing of the motion to set aside and vacate such judgment and default on the 24th day of March, 1902, and within ninety days prior to the filing of said statement of facts." This is all that is

Sept. 1902.] Opinion of the Court—DUNBAR, J.

necessary, and all that may be considered upon the appeal.

The writ is, therefore, denied.

REAVIS, C. J., and ANDERS, FULLERTON, HADLEY and WHITE, JJ., concur.

[No. 4234. Decided September 19, 1902.]

THE STATE OF WASHINGTON, *Respondent*, v. LAWRENCE WHITWORTH, *Appellant*.

EMBEZZLEMENT — SUFFICIENCY OF INFORMATION — ALLEGATION OF AGENCY AND OWNERSHIP OF PROPERTY.

An information charging defendant, as the agent of an insurance company, with embezzling a promissory note, the property of said insurance company, sufficiently states the offense, under Bal. Code, § 7119, which provides that any agent or person to whom any money or other property shall be intrusted, who fraudulently converts the same to his own use, shall be deemed guilty of larceny.

SAME — ESTOPPEL.

An insurance solicitor who takes a promissory note for a premium due on a policy issued by his company, although the note is merely made payable to the order of the maker and by him indorsed in blank, is estopped to deny either the insurance company's ownership of the note or his own agency.

Appeal from Superior Court, King County.—Hon. ARTHUR E. GRIFFIN, Judge. Affirmed.

R. H. Lindsay, for appellant.

Walter S. Fulton, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

DUNBAR, J.—Defendant was tried on an information charging embezzlement, was found guilty, and sentenced. From judgment of sentence this appeal is taken. Many

errors are assigned, but few of which are discussed. We will not enter into a discussion of errors not discussed in the briefs, although we have examined them, and find them without merit. The alleged error of the court in overruling appellant's demurrer to the information is the first subject presented. The charging part of the information is as follows:

"He, the said Lawrence Whitworth, in the county of King, state of Washington, on the 23d day of August, 1901, then and there being the agent of the 'Mutual Life Insurance Company of New York,' a corporation, and as such agent, theretofore having been intrusted with a promissory note in writing of the value of four thousand one hundred and sixty-nine dollars (\$4,169), in lawful money of the United States, the property of the said Mutual Life Insurance Company, and of the tenor following:

'Due November 6th, Seattle, Wn., Aug. 6th, 1901.

Three months after date I promise to pay to the order of myself at my office, Seattle, Washington, \$4,169.00, forty-one hundred and sixty-nine dollars, for value received.

Timothy D. Hinckley.'

Said note having indorsed in writing on the back thereof the name of 'Timothy D. Hinckley,' did then and there wilfully, unlawfully, feloniously and fraudulently embezzle and convert said note and the whole thereof to his own use, and did then and there wilfully, unlawfully, feloniously, and fraudulently fail to account to the Mutual Life Insurance Company, of New York, for said note, or any part thereof."

We think the information is sufficient. The statute under which the information was filed is as follows:

"If any agent, clerk, officer, servant, or person to whom any money or other property shall be intrusted, with or without hire, shall fraudulently convert to his own use, or shall take and secrete the same with intent fraudulently to convert the same to his own use, or shall fail to account to the person so intrusting it to him, he shall be deemed

Sept. 1902.] Opinion of the Court—DUNBAR, J.

guilty of larceny, and on conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year, or be imprisoned in the county jail for any length of time not exceeding one year." Sec. 7119, Bal. Code.

The information alleges that the defendant was the agent of the insurance company, and as such agent had been intrusted with valuable property, that he wilfully, unlawfully, and fraudulently converted the same to his own use, and failed to account for it to the party intrusting it. It can be determined from the information that the crime was committed within the time limited by law for the commencement of actions, and the crime is distinctly and clearly set forth, so that the defendant, if he be a person of common understanding, can have no possible trouble in understanding for what crime he is called upon to answer. The statement of facts furnished him in the information is not perplexing, or calculated to leave him in doubt; and, as we have frequently said, when a defendant is furnished with definite information of this kind, the object of the law is attained. The only real question in this case is that of agency, but we are satisfied from an investigation of the record that the agency was sufficiently established. Neither is it competent for the appellant to now deny the ownership of the note in the insurance company. He treated the company as the owner of the note, and looked to the company for the payment of his interest in the note in case the policy should be accepted; for, under the custom as testified to, the note, when collectible, would have been collected by the company, and the company would then pay the solicitor his percentage. He represented himself as the agent of the company, and procured the note on the representation that it was the property of the company. Hence the own-

ership was properly alleged in the company, and the defendant is estopped to deny the agency or the ownership. The information being sufficient, and no error being discovered in the admission of testimony or in the giving or refusing to give instructions, the judgment is affirmed.

REAVIS, C. J., and HADLEY, FULLERTON, ANDERS, MOUNT and WHITE, JJ., concur.

[No. 4285. Decided September 19, 1902.]

ROSARIO STRAITS PACKING COMPANY, *Appellant*, v. SUNSET PACKING COMPANY, *Respondent*.

RECEIVERS — ALLOWANCE OF CLAIM AGAINST INSOLVENT CORPORATION
— RIGHT OF CREDITOR TO JUDGMENT IN SEPARATE ACTION.

Where a claim against an insolvent corporation has been passed upon by the receiver and the court and allowed, it is in effect a judgment in the insolvency proceedings, and the refusal of the court to enter judgment upon the default of such corporation in a separate action involving the same matter would not constitute error.

Appeal from Superior Court, Skagit County.—Hon. GEORGE A. JOINER, Judge. Affirmed.

Million & Houser, for appellant.

Quinby, Wells & Brawley, for respondent.

PER CURIAM.—This case involves principally the question of the insolvency of the defendant packing company, the respondent, a pure question of fact. From an examination of the whole record, and considering the character of the incorporation and the well-known fact that the production of fishing and canning plants is generally enormous for a short time and meets with ready sale, we

Sept. 1902.]

Syllabus.

think the findings of the court were justified, and that, while the law of this state is too well settled to be questioned that the property of an insolvent corporation is an asset for the benefit of all its creditors, yet the testimony does not show the corporation to have been insolvent at the time the lien of the Boston National Bank attached. There is no evidence of fraud which would bring the case within the principles announced in the cases cited by appellant. An extended review of the testimony would not be beneficial. So far as the question of entering judgment is concerned, the appellant's claim has been passed upon by the receiver and by the court, and is in effect a judgment in that proceeding.

Affirmed.

[No. 4149. Decided September 20, 1902.]

In the Matter of the Estate of HATTIE FEAS, Deceased.

HOMESTEAD — SELECTION.

Mere occupancy of property as a home amounted to a selection of a homestead, prior to the enactment of the homestead law of 1895, and a selection made at any time before sale was sufficient to entitle the claimant to exemption.

SAME — COMMUNITY ESTATE — SELECTION AFTER WIFE'S DEATH.

Under the statute permitting either the husband or wife to claim a homestead in community property while both are living, and vesting it in the survivor on the death of either, it is the spirit and intention of the law that a husband may, after his wife's death, select a homestead from the community property for the benefit of himself and family.

SAME — ATTAINMENT OF MAJORITY BY CHILDREN — EFFECT.

Where a homestead in community property has been once lawfully claimed, it continued as a homestead, even though the children have attained their majority and left the parental roof.

80	51
622	100
633	101
30	51
39	214

SAME — ABANDONMENT.

The fact that a husband who had claimed a homestead in community property belonging to himself and his deceased wife had made conveyances thereof to his children did not constitute an abandonment of the homestead, so as to subject the land to sale for debts of the deceased wife's interest in such community estate.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Reversed.

Root, Palmer & Brown, for appellant.

S. S. Carlisle (Remsberg & Simmonds, of counsel), for respondent.

The opinion of the court was delivered by

HADLEY, J.—In this cause the administrator filed a petition asking an order for the sale of real estate to pay debts and expenses of administration. Objections to the making of such order as to 150 acres of the land described in the petition were interposed. The particular land involved under the objections is described as 150 acres of the northeast quarter of section 29, township 24 north, range 2 east, situate in Kitsap county, Washington. The grounds of objection to the order of sale, substantially stated, are as follows, viz.: That Hattie Feas died in August, 1892; that said property was acquired from the United States by Abraham S. Feas, while he was the husband of the deceased, Hattie Feas, and was until the time of the death of said Abraham S. Feas, which occurred March 21, 1899, in his actual possession as a homestead for himself and minor children, and that the same has at all times been exempt from all debts and liabilities of said estate; that said Abraham S. Feas, in March, 1895, after the death of his said wife, and while residing upon said land with his minor children, filed with the auditor of Kitsap county a declaration of homestead upon the land;

Sept. 1902.] Opinion of the Court—HADLEY, J.

that prior to his death the said Abraham S. Feas executed and delivered to his children, being seven in number, deeds of conveyance to all of the quarter section above named; that the objector, Carrie M. Feas, is a daughter of said deceased, Hattie Feas, and Abraham S. Feas, and has never parted with her interest in said estate; that she is also the successor in interest to all of the other children and heirs at law of the said Hattie and Abraham S. Feas, excepting William W. Feas, he being the owner of a certain 10-acre tract in said quarter section, the remaining children and heirs having conveyed to the objector by good and sufficient deed all their interest in said property. The objector asks that said land shall not be sold, and that the court shall make an order finding that at all times after the acquirement of the land by Abraham S. Feas it was the homestead for himself and minor children, and was never subject to any indebtedness of the deceased. The objections were overruled by the court, and the land was ordered sold. From such order the objector has appealed.

The court found that the land did not exceed in value the sum of \$1,000 at the time of the death of said Hattie Feas, and that said Abraham S. Feas continuously resided upon the land, and made it his home, from 1883 until his death in 1899, and had at all times living with him minor children of himself and said Hattie Feas. This property was the community property of Abraham S. Feas and his wife. It was occupied as a homestead at the time of the wife's death. The community estate passed into administration after the death of the wife, and it is under that administration that this order of sale was made. It is urged by respondent that the declaration of homestead filed by the surviving husband in March, 1895, was of no effect because the law of 1895 providing for filing such declaration was not yet in force. Prior to the law of 1895

there was no provision for such formal declaration, and it was held in *Philbrick v. Andrews*, 8 Wash. 7 (35 Pac. 358), that mere occupancy of property as a home under the law then existing amounted to a selection of a homestead. To the same effect is *Asher v. Sekofsky*, 10 Wash. 379 (38 Pac. 1133). Under the above decisions mere occupancy of land as a home, and any assertion of claim to it as a homestead, before sale, was sufficient. In *Wiss v. Stewart*, 16 Wash. 376 (47 Pac. 736), it was contended that the law of 1895, which provides the manner of selecting a homestead, repealed § 481, 2 Hill's Code, which simply provides that a selection may be made at any time before sale. The court held against the contention and said:

“The latter act in no way affects the provision in relation to the time of making the selection, but simply undertakes to direct the manner of such selection, and the provision that such homestead may be selected at any time before sale is still in effect.”

Thus, under the law existing in March, 1895, the surviving husband, being in occupancy of the land as a home with his minor children, thereby asserted claim to it as a homestead, and the written declaration which he filed became positive and confirmatory evidence of such fact, although no law then required him to make and file such formal declaration. If, then, the surviving husband could claim a homestead, it was sufficiently done.

It is urged that a surviving husband cannot claim a homestead in the community interest of his wife after her death. It is undoubtedly the intention of the present law to authorize either the husband or the wife to make such claim while both are living. § 5244, subd. 1, Bal. Code. When selected from the community property, the homestead vests in the survivor upon the death of either

Sept. 1902.] Opinion of the Court—HADLEY, J.

spouse. § 5246, Bal. Code. The purpose of all homestead provisions is to protect the family, including minor children. For that reason a homestead selected by either spouse during coverture vests in the surviving husband, in order that the family composed of himself and minor children may have the benefit of a home. It would seem inconsistent and unreasonable that the law should authorize the parents, during the lifetime of both, to anticipate the welfare of the children by thus selecting a homestead that will vest in the father, and yet at the same time prevent the father from making such selection after the mother's death, if it was neglected before that time. Such a construction would take from a father the power to provide a home for his children, which the law intends he may do. It is argued by respondent that under §§ 6215, 6219 and 6220, Bal. Code, there is no authority in probate proceedings to set aside a homestead except to a widow or to the minor children of a deceased husband. *In re Murphy's Estate*, ante, p. 9 (70 Pac. 109), we had occasion to pass upon a similar contention in reference to allowance for the use of the family pending settlement of an estate. It was contended in that case that such an allowance cannot be made when the community estate is under administration on account of the death of the wife, and can only be made in the event of the husband's death. It was held, however, that since the welfare of minor children is one of the main purposes of the statute, it would defeat that purpose to hold with the above contention. The law was passed in 1854, long before the existence of our community property laws, and when, by the system of separate ownership, a surviving husband controlled his estate, and could use it for the benefit of his minor children. Now, however, the community estate passes into administration, leaving the surviving husband

without means to care for the family of minor children, if no allowance can be made from the estate. We held that the earlier law must be construed in connection with the later community law so as to effect the real purpose intended in the way of providing for minor children. The same reasoning applies to the homestead which is under consideration in the case at bar. We think it is the manifest spirit and intention of the law that a husband may, after his wife's death, select a homestead from the community property for the benefit of himself and family.

It is contended in support of the order of sale in this case that at the time it was sought to subject this property to sale there were no minor children, and that the property had been abandoned as a family residence. We do not think, however, that such facts constituted an abandonment of the homestead. There were a number of minor children when the homestead was claimed as such, and there was never any abandonment thereof by the father. It is true he conveyed it to his children, but that was not an abandonment. Our law provides for a conveyance of the homestead, and to make such conveyance effectual the grantor must have the privilege of leaving it and establishing his residence elsewhere after it has been so conveyed. Moreover, under the law of 1895 a homestead can be abandoned only by a declaration to that effect, duly executed and acknowledged. § 5220, Bal. Code. While Abraham S. Feas held this land as a homestead free from debts of the community estate, he conveyed it to his children, who in turn have conveyed it to their sister, the objector here. The grantees of Mr. Feas took the land as he held it free from obligations of the estate. Carrie M. Feas, their grantee, holds it likewise, and it is not, therefore, subject to sale for debts of the estate.

For these reasons we think the order of sale was er-

Sept. 1902.]Syllabus.

roneously made. The judgment is, therefore, reversed, and the cause remanded, with instructions to the lower court to dismiss the petition to sell in so far as it relates to property included in the objections.

REAVIS, C. J., and FULLERTON, MOUNT, ANDERS, DUNBAR and WHITE, JJ., concur.

[No. 3802. Decided September 28, 1902.]

NELLIE M. CROWLEY, Respondent, v. MARTIN J. McDONOUGH *et ux.*, Appellants.

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32	318
30	57
435	408
30	57
41	622

APPEAL — BRIEFS — ASSIGNMENT OF ERRORS.

Although appellant may not have specifically assigned the errors relied on for reversal in his brief, as required by statute and rule of court, the court will not strike the brief and affirm the judgment, when it has been able to discover therefrom the errors relied on.

SAME — STATEMENT OF FACTS — FILING — EXTENSION OF TIME.

Under Bal. Code, § 5062, which provides that a proposed statement of facts must be filed and served within thirty days after appeal may be taken from a final order, which time may be enlarged either before or after its expiration, but not for more than sixty days additional, an application for an extension of time within which to file a statement of facts must not only be filed but acted upon by the court, within the sixty days next following the thirty days after the right to appeal accrues.

SAME — POWER OF COURT TO ORDER NUNC PRO TUNC.

The superior court has no power, after the expiration of the time limited by statute for the filing of a statement of facts, to order the filing of such statement as of a previous date, where the application for further time was not considered by the court during the time prescribed by law for such filing.

SAME — MOTION AFTER EXPIRATION OF NINETY DAYS A NULLITY.

After the expiration of the original thirty days provided by statute, a statement of facts can be filed only by permission of the court, and hence the filing of a statement thereof, but within the

sixty days additional permitted by statute, without leave or order of court, would not create or preserve any rights in favor of appellants, or entitle them to any of the benefits accruing from a timely filing of such statement.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Stern, Hamblen & Lund (George H. Williams, of counsel), for appellants.

Hyde, Latimer & Barnes, for respondent.

PER CURIAM.—This was an action for personal injuries alleged to have been inflicted on the plaintiff by the defendant, Martin J. McDonough. From a judgment in favor of the plaintiff, the defendants have appealed to this court.

The respondent moves to strike from the files and disregard the brief of appellants, and to affirm the judgment in this cause, on the ground and for the reason that the said brief fails to point out the errors relied on for a reversal of the judgment, and contains no assignments of error as required by law and the rules of this court. It is provided in § 6514, Bal. Code (Laws 1893, p. 127), that the appellant's brief "shall clearly point out each error that the appellant relies on for a reversal;" and rule 8 of this court is to the same effect. This provision is clear and explicit, easily understood, and should be at least substantially observed by counsel in all cases. Although a technical assignment of errors is not now required in this state, a specification of the errors alleged to have been committed in the lower court, substantially similar to that which constitutes a common-law assignment of errors, is indispensably necessary. And this specification must be made, not in the record, but as we have seen, in the brief of the appellant. The object and purpose of the

Sept. 1902.]Opinion Per Curiam.

specification of errors is to apprise the appellate court of the specific questions presented for its determination, and to inform the opposite party of the alleged errors intended to be relied on for a reversal of the judgment, and thereby obviate the necessity of the examination by the court, and the discussion by counsel, of all the questions raised on the trial in the lower court, respecting which it may be conjectured that there is possible error. There is a wide distinction between an argument and an assignment or specification of errors, and, therefore, a mere argument of abstract legal propositions cannot be regarded as such assignment, in contemplation of our statute. And hence in *Haugh v. Tacoma*, 12 Wash. 386 (41 Pac. 173) and *Perkins v. Mitchell, Lewis & Slaver Co.*, 15 Wash. 470 (46 Pac. 1039), and other cases, this court was constrained to hold that, where the brief of the appellant fails to point out the errors relied on for a reversal, the brief will be stricken from the files, and the judgment appealed from affirmed, notwithstanding the fact that certain legal questions are argued in appellant's brief. The court proceeded on the theory, which is manifestly correct, that an argument is of no avail unless it is addressed to some alleged error or errors, and is applicable thereto. But we have never affirmed a judgment or dismissed an appeal for the simple reason that errors were informally assigned. It is stated in appellant's brief in the case at bar, after quoting parts of the plaintiff's testimony, that, upon the conclusion of the opening statement on behalf of plaintiff, counsel for the defendants moved for a dismissal of the case as to Mrs. McDonough upon the ground that there was no liability, as against her, because of any act of her co-defendant; that, at the conclusion of plaintiff's evidence, this motion was renewed with greater detail; that a motion for a new trial was also made and argued, based

chiefly upon the non-liability of the defendant, Mrs. McDonough, for an assault committed by her co-defendant; and that, in addition to all this, a motion was made to correct the judgment so as to relieve said defendant, Mrs. McDonough, from any liability. And it is then stated that "the principal exceptions naturally arise from the denial of the several motions made, in behalf of the defendant, Mrs. McDonough, to dismiss the case as to her." Some other "exceptions" are mentioned in the brief without argument, and will, therefore, not be considered, and the question is, are the errors relied on by the appellants sufficiently pointed out in their brief? It is insisted by counsel for the respondent that in this regard neither the statute nor the rules of this court have been complied with. But while the pages of the record should have been referred to as required by our rules, and the errors more specifically alleged, yet, inasmuch as we have been able to discover the errors "relied on for a reversal," we are not disposed to affirm the judgment upon this motion, and the motion is therefore denied, under the liberal rule adopted in *Ranahan v. Gibbons*, 23 Wash. 255 (62 Pac. 773).

The respondent also moves this court to strike the statement of facts, and to affirm the judgment, on the grounds: (1) That the statement of facts was not filed and served within the time provided by law; (2) that no application for an extension of time for serving or filing such statement was made within the time provided by law; (3) that the order extending the time for filing and serving the statement of facts was made more than ninety days after the entry of the final judgment in this action; (4) that the statement of facts is not certified as provided by law, and was not certified within ninety days from the entry of the final judgment, and was certified without jurisdiction of

Sept. 1902.]Opinion Per Curiam.

the court to make the order, and that no notice of filing said statement of facts was given respondent; (5) that the said statement of facts is not certified to in accordance with law, and does not purport to contain all the evidence given in said cause, and is not such a statement of facts as the law requires in cases tried to a jury; and (6) that no notice of either the filing, settling, or certifying said statement was ever given the respondent. This motion presents some important and interesting questions, the determination of which necessitates an examination, to some extent, of the record, as well as a consideration of the statutes applicable thereto.

It is disclosed by the record that the final judgment in this cause was entered on May 29, 1900; that sixty days after said date, and on July 28th following, the appellants filed with the clerk of the superior court their proposed statement of facts, without leave of the court and without notice to the respondent; that two days thereafter, on the 30th day of July, appellants served their proposed statement upon the respondent; and that afterwards, but on the same day, they served on respondent a motion for an order extending the time to file and serve their statement of facts up to and including July 30, 1900, which motion was based on affidavits to be served before the hearing thereof; that on August 28th, ninety-one days after the entry of the judgment, the said motion was filed in the superior court; that proof of service of the statement of facts and of the motion to extend the time for filing the same was not filed in the trial court until September 22, 1900; that the affidavits in support of the above-mentioned motion were served on the respondent on the 12th day of September, being one hundred and six days after the date of the entry of the judgment herein; and that on September 24, 1900, which was one hundred and eighteen

days after the entry of the judgment appealed from, the superior court made an order extending the time to file and serve the statement of facts up to and including the previous 30th day of July. Our statute provides that a party desiring to have a bill of exceptions or statement of facts certified must prepare the same, as proposed by him, file it in the cause, and serve a copy thereof on the adverse party, and shall also serve a written notice of the filing thereof on any other party who has appeared in the cause. Within ten days after such service, any other party may file and serve on the proposing party any amendments which he may propose to the bill or statement. Either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending or was tried, at a time and place specified,—the time to be not less than three nor more than ten days after service of the notice,—to settle and certify the bill or statement. If the judge is absent at the time named in the notice, or fixed by adjournment, a new notice may be served. If no amendment shall be served within the time aforesaid, the proposed bill or statement shall be deemed agreed to, and shall be certified by the judge at the instance of either party, without notice to any other party, on proof being filed of its service, and that no amendments have been proposed, and if amendments be proposed and accepted, the bill or statement, as so amended, shall likewise be certified on proof being filed of its service and the service and acceptance of the amendments. Bal. Code, § 5058. And it is further provided in § 5062, Bal. Code, that:

“A proposed bill of exceptions or statement of facts must be filed and served either before or within thirty days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the

Sept. 1902.]Opinion Per Curiam.

case may be) from an order with a view to an appeal from which the bill or statement is proposed: Provided, That the time herein prescribed may be enlarged either before or after its expiration, once or more, but not for more than sixty days additional in all, by stipulation of the parties, or for good cause shown, and on such terms as may be just, by an order of the court or judge wherein or before whom the cause is pending or was tried, made on notice to the adverse party. . . . ”

The proposed statement of facts in this cause was certified by the judge before whom the action was tried without notice to the plaintiff or her attorneys, for the reason, as stated in the certificate, that no amendments had been proposed thereto. It will be remembered that the appellants did not undertake to file their proposed statement of facts, or to obtain an order of the court enlarging the time within which to file and serve the same, until sixty days after the entry of the judgment from which the appeal is taken. And it is contended, on the part of the respondent, that said § 5062 of the Code aforesaid, properly interpreted, requires the application for an extension of time therein mentioned to be made within the thirty days next succeeding the date of the entry of the judgment. But we do not think that section is susceptible of such construction, and this court has uniformly held that such application may be made to the court after the expiration of thirty days from and after the entry of judgment. The application, however, must be made within the thirty days' limit, or within the succeeding sixty days; for even a settled and certified statement of facts, if filed more than ninety days after entry of final judgment, will be of no avail to the appellant, and will, on motion of the respondent, be disregarded by the supreme court, or stricken from the files. *Loos v. Rondema*, 10 Wash. 164 (38 Pac. 1012). And it would seem necessarily to follow that, if

a statement may not be *filed* after the expiration of the ninety days following the judgment, an application to extend the time within which to file it may not be made after the lapse of said time. We have stated that the motion to extend the time within which to file their statement was not filed by appellants in the superior court until August 28, 1900. This appears from the indorsement or file marks of the clerk upon the motion as presented in the record, although appellants seem to claim that the motion was really filed on the 28th day of July. Assuming the clerk's record to be correct, it will readily be seen that the motion and application under consideration was not filed within the proper time. Until the motion was filed, there was evidently no application at all before the court for an extension of time. The mere service of the motion on counsel for respondent brought nothing before the court for its consideration; and even the filing of the motion after ninety days from May 29th, conferred no authority upon the court to grant it. Under the statute, it seems clear that an application for an extension of time within which to file a bill of exceptions or statement of facts must not only be filed, but acted on by the court, within the sixty days next following the thirty days after the right to appeal accrues. Certainly, the superior court has no power, after the expiration of the time limited by statute for the filing of a statement of facts, to order the filing of such statement as of a previous date, in a case like this, where the application for further time was not considered by the court during the time prescribed by law for such filing. It seems to be claimed, however, on the part of the appellants, that, inasmuch as the statement of facts was actually filed or deposited with the clerk within ninety days after the entry of the judgment appealed from, the appellants are entitled to all the benefits accruing from

Sept. 1902.]Syllabus.

a timely filing of a statement. But we are unable to assent to that proposition. After the expiration of the original thirty days provided by the statute, a statement of facts can be filed only by permission of the court, and hence the filing of the statement by the appellants, without leave or order of the court, was not authorized by law, and neither created nor preserved any rights in their favor. Such filing was a mere nullity, and was properly so considered by the respondent. In this connection it may be stated that it is not even claimed that the statement of facts was filed or served under the order of the court of September 24, 1900.

For the foregoing reasons, the motion to disregard the statement of facts in this case must be granted, and, as there is now nothing before this court for determination, the judgment must be affirmed; and it is so ordered.

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[No. 4117. Decided September 28, 1902.]

SEWALL P. STONE *et ux.*, *Respondents*, v. CITY OF SEATTLE, *Appellant*.

DEFECTIVE SIDEWALKS — ORIGINAL PLAN OF CONSTRUCTION.

A city cannot relieve itself from liability for defective streets, even if the defect were a part of the original plan of construction, instead of one arising from negligence to repair.

SAME — NEGLIGENCE OF CITY — QUESTION FOR JURY

In an action for personal injuries received by stepping into a hole left at the intersection of two sidewalks, it was error to grant a nonsuit when the evidence showed that, after the opening had been left at that point as a part of the original plan of construction, an electric light pole was so placed as to cast the hole in shadow at night, and that plaintiff stepped into the opening while passing along the walk at night, the shadow creating the appearance of an unbroken surface in the walk at that point.

Appeal from Superior Court, King County.—Hon. FRANK H. RUDKIN, Judge. Affirmed.

W. E. Humphrey and Edward Von Tobel, for appellant.
John F. Dore and Noon & Noon, for respondents.

The opinion of the court was delivered by

HADLEY, J.—This action was brought to recover for personal injuries alleged to have been received by respondent Mary E. Stone, from a fall caused by stepping into a hole in the street. The evidence shows that at the junction of Kilbourne and Bowman avenues, in the city of Seattle, the outer plank of the cross walk was some inches short, leaving an opening which was at that time four or five inches deep, and of sufficient size for a person to step into it. This accident occurred at night. Near this opening stood a large electric light pole, from which an electric arc light was suspended in such a manner as to cast the shadow of the pole over said opening. Mrs. Stone, while passing over this cross walk, stepped into the opening while it was thus covered by the shadow, and fell, receiving the injuries for which she seeks to recover.

It appears from the evidence that the opening had existed from the time of the construction of the walk, some years before. The immediate surroundings had, however, been subsequently changed to the extent of the erection of the electric light pole and the swinging of the light thereon, by which the shadow was cast over the opening as aforesaid. The evidence further shows that the shadow extended entirely over the opening, and for some distance around it, thus presenting an extended dark and shadowy surface, all having the same general appearance as though cast upon the unbroken surface of the street at that point. The respondent, Mrs. Stone, says that, in the absence of the

Sept. 1902.] Opinion of the Court—HADLEY, J.

shadow, the light would have revealed the opening, which she could have seen and avoided. When the respondents had introduced all their testimony bearing upon the question of negligence on the part of the city, having, as announced by counsel, no other evidence to offer except that of physicians as to the nature and extent of the injuries, a motion for non-suit was interposed by the city, on the ground that there was a total failure of proof as to any negligence on the part of the city. The motion was granted, and the jury discharged. Thereafter respondents moved for a new trial on the ground that the court committed error in law at the trial; that the evidence was insufficient to justify the court's decision, and was against the law. The latter motion was also granted, and a new trial ordered. From the order granting a new trial the city has appealed.

The only error assigned is that the court erred in granting the motion for a new trial. It is asserted in appellant's brief that, since the court granted the motion for non-suit, and dismissed the action, the motion for new trial, under our statute, is not the proper practice, and should not have been granted. The above position assumed by counsel is not discussed in the brief, and, since we see no merit in it, we will not discuss it here. The real contention of appellant is that the opening in the crosswalk was not a defect, but was an opening at the inner corner at the point where the crosswalk joins the sidewalk, and as such was a part of the drainage system of the street; that the opening was necessary in order to admit the surface water from the street into the gutter, and to give opportunity to remove any material that might accumulate in the gutter. It is contended that the street was not out of repair, and that the alleged dangerous condition was caused solely from the manner of construction of the sidewalk, crosswalk, and gut-

ter; that the city is not liable for an injury caused by a defective plan of construction, for the alleged reason that the adoption of such original plan by the city was a *quasi* judicial act, and was also the result of the exercise of legislative and discretionary functions, upon which liability cannot be predicated. In support of this contention appellant cites the following cases: *Urquhart v. Ogdensburg*, 91 N. Y. 67 (43 Am. Rep. 655); *Monk v. New Utrecht*, 104 N. Y. 552 (11 N. E. 268); *Lansing v. Toolan*, 37 Mich. 152; *Conlon v. St. Paul*, 70 Minn. 216 (72 N. W. 1073). The cases cited seem to support the contention. The Minnesota case cited states the rule substantially as follows: That, if reasonable men might differ as to which is the better plan, the decision of the city authorities on the question is conclusive, and cannot be reviewed by the courts; that neither the court nor the jury can substitute its judgment for that of the city authorities in such a case; but, when there is such gross error of judgment as to show that in fact the city authorities never exercised an intelligent judgment at all, the city may be liable for constructing or maintaining an improvement on a defective plan or scheme so adopted by it. The difficulty with the doctrine as stated in the last named case, it seems to us, lies in the fact that it would probably be difficult to find a case where city authorities have deliberately adopted a plan about which reasonable men might not differ as to whether an intelligent judgment had been exercised, when all the attendant circumstances are considered. Referring to the Michigan case, *Lansing v. Toolan, supra*, cited by appellant, we find that it had been previously held in Michigan that cities were not liable for injuries resulting from defective streets, on the theory that the streets of a city are public highways, like all other roads, and that no distinction existed in that state between the liability of cities and that

Sept. 1902.] Opinion of the Court—HADLEY, J.

of counties. *Detroit v. Blackeby*, 21 Mich. 84 (4 Am. Rep. 450). In harmony with the above case the *Toolan Case* was decided, in which it was held that a city could not be held liable for injuries resulting from a plan of a public work, where the injured person fell into a ditch which was dug across the street by a city contractor, but was not covered the full width of the street, and which ditch was a part of the plan of certain constructive work. In referring to the Michigan doctrine, and while considering cases from that state here discussed, it is observed in a note under § 1024, 2 Dillon, Municipal Corporations (4th ed.), as follows:

"It seems to the author, however, as he understands the facts, that these are cases where the street was rendered unsafe for travel by the direct act of the city, or its contractor, and that the city would be held liable in those states in which an implied municipal responsibility is recognized for unsafe streets, which, however, is not the case in *Michigan*."

Thus it appears to be the view of the author that the doctrine of non-liability because of a defective plan, while it may be consistent with the doctrine then announced in Michigan, that municipal liability does not exist for any defect in a street, is nevertheless inapplicable in a state where there is an implied liability for unsafe streets. In this view we concur. Since the above Michigan decisions the legislature of that state has passed an act expressly declaring municipal liability for defective streets, and the supreme court of that state has construed the law to include defects in the plan of construction as well as those arising by neglect to repair. *Carver v. Detroit & S. Plank Road Co.*, 61 Mich. 584 (28 N. W. 721); *Sebert v. Alpena*, 78 Mich. 165 (43 N. W. 1098); *Schrader v. Port Huron*, 106 Mich. 173 (63 N. W. 964). Thus, by the construction placed upon the statute, the earlier Michigan decisions have been

overruled, and the doctrine of non-liability of a municipality for a defective plan in street construction no longer exists in that state.

The doctrine announced in the New York cases cited by appellant seems to be in conflict with some other decisions in that state. In *Clemence v. Auburn*, 66 N. Y. 334, the rule is questioned, and the principle of the holding in *Seifert v. Brooklyn*, 101 N. Y. 136 (4 N. E. 321, 54 Am. Rep. 664), does not seem to be easily reconcilable with the cases cited. But, whatever may now be said to be the rule in New York, the following cases from other jurisdictions clearly refuse to distinguish between the municipal liability because of a defective plan of construction and that which arises from negligence to repair. It is held that actionable negligence is included in the one as much as in the other. *Circleville v. Sohn*, 59 Ohio St. 285 (52 N. E. 788, 69 Am. St. Rep. 777); *Hinds v. Marshall*, 22 Mo. App. 208; *Chicago v. Seben*, 165 Ill. 371 (46 N. E. 244, 56 Am. St. Rep. 245); *Kendall v. Albia*, 73 Iowa, 241 (34 N. W. 833); *Poole v. Jackson*, 93 Tenn. 62 (23 S. W. 57); *Dallas v. Jones*, 93 Tex. 38 (53 S. W. 377); *Gould v. Topeka*, 32 Kan. 485 (4 Pac. 822, 49 Am. Rep. 496); *Blyhl v. Waterville*, 57 Minn. 115 (58 N. W. 817, 47 Am. St. Rep. 596).

The last named case modifies the rule by the condition that liability shall exist only when there is no necessity or reason for the defective plan; and *Gould v. Topeka, supra*, also limits it by the condition that, if the plan is such that different minds may entertain different opinions as to whether it is dangerous or not, the benefit of the doubt may be given to the board that planned it, and the city held not liable, but that, even in such event, it must appear that the exact matter was under consideration by the governing board, and after due deliberation such plan was expressly

Sept. 1902.] Opinion of the Court—HADLEY, J.

adopted, or expressly ratified. The latter condition does not appear from the evidence in the case at bar. It simply appears that the construction was probably originally made as it now is, but whether the plan was considered and expressly adopted by the proper governing authorities of the city does not appear. We think, in any event, however, that the weight of authority is against appellant's contention, and that a city cannot relieve itself from liability for defective streets because the defect may be part of an original plan of construction.

This court held that the question of negligent construction of the street was one for the jury in *White v. Ballard*, 19 Wash. 284 (53 Pac. 159), although the original-plan doctrine here under consideration seems not to have been discussed. We think it was a question for the jury in the case at bar whether the city neglected to keep the street in safe condition, and it is immaterial whether the defect arose from the original construction or from subsequent causes. There is also an additional element which calls for its submission to the jury, and that is whether the city was negligent in permitting the electric light to be so placed that the shadow of the pole supporting it concealed the opening in the walk, if such be the fact. The evidence introduced by the respondents certainly tended to establish that fact, and it was for the jury to say what was the fact in that particular. We think the case was erroneously withdrawn from the jury, and that the new trial was properly granted.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, MOUNT, DUN-BAR and WHITE, JJ., concur.

[No. 4184. Decided September 28, 1902.]

DANIEL SULLIVAN *et al.*, *Respondents*, v. ANDREW JOHN-
SON, *Appellant*.

SURFACE WATER — DIVERSION UPON LANDS OF ANOTHER.

Where surface waters are confined by natural barriers, so that the waters do not run from such confinement naturally, the upper proprietor may not construct a ditch so as to cast such waters upon his neighbor, to the latter's material injury.

Appeal from Superior Court, Skagit County.—Hon. GEORGE A. JOINER, Judge. Affirmed.

Dorr & Hadley and *Henry McLean*, for appellant.

Million & Houser, for respondents.

The opinion of the court was delivered by

MOUNT, J.—Appellant is the owner of the west half of section 10, township 35 north, range 3 E., W. M., in Skagit county, except sixty acres in the northwest corner of the section. On the southwest portion of appellant's land is a tract of low, marshy, unimproved ground, comprising some thirty or forty acres, upon which surface water accumulates during the rainy season to the average depth of seventenths of a foot. At its greatest depth, the water does not exceed about one foot, when it overflows a natural, sandy clay ridge surrounding it, and runs off in a northwesterly direction, and eventually finds its way into a system of ditches used in draining the lands of respondents. When the overflow ceases, the remainder of the water confined in the marshy basin named is dissipated by percolation or seepage and evaporation. The lands of respondents are improved, tillable lands, and valuable for agricultural purposes. They are lower than the lands of appellant, are situated to the northeast of appellant's lands, and are drained

Sept. 1902.] Opinion of the Court—MOUNT, J.

by a system of ditches which have been used for a number of years. These ditches in the wet season are not of sufficient capacity to carry off the waters accumulating upon respondent's land. At the time this action was begun appellant was constructing a ditch, through the natural barrier above named, to drain the water which accumulates in the basin above named through the natural barrier, upon his neighbor, and thereupon into the ditches which drained respondents' lands. The lower court granted an injunction restraining the defendant from constructing the ditch in question. The defendant appeals.

It will be observed that there is no material distinction between the facts in this case and those in the case of *Noyes v. Cosselman*, 29 Wash. 635. It was there held that, where surface waters are confined by natural barriers so that the same do not run from such confinement naturally, the upper proprietor may not construct a ditch so as to cast such waters upon his neighbor, to the material injury of such neighbor. This rule of law applicable to the case in hand being settled, it is necessary only to consider the facts with reference to the injury. It was alleged in the complaint, and found by the court in the trial below, as follows:

"That said ditch heretofore constructed by the plaintiffs is insufficient to fully drain and properly take care of the surface waters falling on the lands on each side thereof within a distance of 160 rods, that the lands of the plaintiffs and especially of the plaintiff Daniel Sullivan are in a high state of cultivation and drained by a system of underground or covered ditches, and that, in its present condition, if any more water were thrown into said ditch it would thereby cause the lands of plaintiffs to overflow and the said underground ditches to become and remain full of water, and thereby greatly damage the property of the plaintiffs; and that if defendant is permitted to drain said

sink or basin into said ditches that plaintiffs will thereby suffer great and irreparable damage to their lands."

There is some dispute in the evidence upon the question of damages. Some of the witnesses testify that in their opinion the drainage of this water would benefit the lower proprietors. Other witnesses testify that the drainage of the waters contained on the appellant's lands, into the ditches, would render respondents' lands worthless by reason of the increased waters cast upon them. There is apparently no dispute that the ditches now draining respondents' land are inadequate to carry off the water accumulating thereon during the wet season and after heavy rains, and that these rains frequently occur late in the season, and at seeding time. The lower court was in a better position to judge of the truth of this evidence than we are, and for this reason the findings will not be disturbed.

Judgment affirmed.

REAVIS, C. J., and FULLERTON, HADLEY, DUNBAR, ANDERS and WHITE, JJ., concur.

[No. 4221. Decided September 23, 1902.]

JOHN BROWDER *et al.*, *Appellants*, v. NELLIE PHINNEY,
Respondent.

ACTIONS — FORM OF — EQUITABLE RELIEF IN ACTION FOR DAMAGES.

Under Bal. Code, § 4793, which provides that there shall be in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action, it was error for the court to dismiss an action for damages for forcible and wrongful eviction from leased premises on the ground of the invalidity of the lease in law for lack of acknowledgment, when in fact the lease was enforceable in equity as a valid contract by reason of part performance thereunder.

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Sept. 1902.] Opinion of the Court—DUNBAR, J.

TRIAL — CHALLENGE TO EVIDENCE — EFFECT OF DENIAL.

The overruling of defendant's challenge to the sufficiency of the evidence does not entitle plaintiff to judgment, under the practice in this state.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

S. S. Langland and W. T. Scott, for appellants.

Piles, Donworth & Howe, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an action for damages for wrongful and forcible eviction from leased premises. Plaintiffs obtained from the defendant, on the 31st day of August, 1899, a contract or lease of two store rooms in Seattle, described, for a term of three years, with stipulated rent, which contract or lease was signed by defendant, Nellie Phinney, through her agent, Daniel Jones, and delivered to plaintiffs. Plaintiffs alleged that they were put in possession of said premises by defendant on October 1, 1899; that they paid rent therefor for the months of October and November of said year to said defendant, and said rent was accepted by said defendant; in short, that they were incommoded during the time of their lease by the improvements which were made upon the premises for the lessors, and were finally, on the 12th day of January, 1900, forcibly evicted from the premises by defendant. At the opening of the trial, defendant's counsel objected to the introduction of any testimony under the complaint, for the reason that it did not state facts sufficient to constitute a cause of action, which motion was denied. At the close of plaintiffs' testimony defendant moved for a nonsuit on the ground that the instrument sued on was invalid, and that the plaintiffs had not shown any facts to take it out of the statute of frauds, and for the further reason that authority

in the agent to execute the lease was not shown. This motion was denied by the court. Counsel for defendant then moved the court to instruct the jury to return a verdict for defendant on the ground that a court of law has no power to entertain this suit. This motion was granted, and the case dismissed, the court taking the view that the lease was invalid in law because it was not acknowledged, and that the facts showing part performance of the contract could be enforced in equity, but could not be shown in an action at law.

We think the court erred in dismissing the action. Whether or not the contract or lease was originally illegal, it is not necessary for the purpose of this discussion to determine. But if illegal, a part performance of the contract, either by the plaintiffs taking possession of the premises under the lease or by the payment and acceptance of rent under the terms of the lease, would render the lessor liable for damages for its violation by him; and the court, in holding that part performance could not be shown in an action for damages, lost sight of the rule of concurrent jurisdiction with which courts are clothed, especially under the reformed procedure. Our statute (Bal. Code, § 4793) provides that there shall be in this state but one form of action for the enforcement of private rights and the redress of private wrongs, which shall be called a "civil action"; and this statute evidently means something. It was not intended by this enactment of the law-making power to leave in force or to perpetuate the old distinctions which existed at the common law between legal actions and equitable procedures, so far as the manner of bringing the actions is concerned. It was plainly the intention thereby to abolish such distinctions, and to substitute for all other forms of complaint a statement of facts, for it provides that the complaint shall contain a plain and concise statement of

Sept. 1902.] Opinion of the Court—DUNBAR, J.

facts constituting the cause of action, and this plain and concise statement of facts must necessarily be the same (if it is a concise statement of facts) whether the relief or remedy sought by the action be equitable or legal in its nature. In this case, if the plaintiffs had demanded specific performance, the statement of facts on which the demand would have been based would have been identically the same statement as that upon which the demand made *was* based. It is not in accordance with the spirit of the code to turn a litigant out of court, and subject him to the costs and delays of bringing another action before the same tribunal on the same pleadings. If there could be any doubt as to the meaning of the statute in this respect, it is set at rest by the further provision that the defendant may set forth by answer as many defenses and counterclaims as he has, whether they be such as have heretofore been denominated legal or equitable, or both; for it cannot be presumed that the legislature intended to make provision for the determination in one action of legal and equitable rights alleged in an answer, and to preclude the determination in the same action of legal and equitable rights alleged in the complaint. It may not have been the intention of the legislature to abolish all the distinctions which have so long existed between legal and equitable proceedings and the rules governing them. That question it is not necessary to discuss here. But it was the evident intention to provide for the trial and determination of all rights, whether denominated legal or equitable, in one action, and to relieve from the necessity of a multiplicity of suits to determine controversies between litigants. The superior court is a court of general jurisdiction. It has the power to try either legal or equitable proceedings, having concurrent jurisdiction in both. It is not a law court, nor an equity court, nor a probate court, but it is all the time the superior

court of general jurisdiction, empowered to try all these differently termed causes under the title of a civil action; and when it has once acquired jurisdiction of that civil action it may proceed in an orderly way to determine equitable, legal, or probate controversies. This view is well expressed in the case of *Filley v. Murphy*, *ante*, p. 1 (70 Pac. 107), where it is said:

"It is assigned as error that the court overruled the appellant's demurrer to the petition for citation. This assignment is based upon the theory that the petition showed upon its face that the title and right of possession to certain property were involved, and that the court sitting in a probate proceeding could not hear it. If the demurrer had been interposed to the petition before the issuance of the citation, the question would then have been presented whether, under the facts stated, relief by way of citation could be had; but, in any event, we think the court might have proceeded to settle issues under the petition for trial. In this state we have no probate court, properly speaking, as distinguished from the court that entertains jurisdiction of other matters. The court of general jurisdiction also hears and determines probate matters. Matters pertaining to probate are referred to what is called 'probate procedure,' as distinguished from what is denominated 'civil' or 'criminal procedure.' But when the court, sitting in a probate proceeding, discovers in a petition the statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder when an appearance has been made thereto, and then proceed to try it in a proper manner, as any other civil cause. The court may require the proceeding to be separately docketed, if, when the issues are formed, it appears to be such as should be thus docketed. Whether a citation should have issued on the strength of this petition or not, it is nevertheless true that appellant responded to the citation, and appeared generally by demurrer to the petition, and asked its dismissal simply on the ground that the court could not hear it as a probate proceeding. We think it was

Sept. 1902.] Opinion of the Court—DUNBAR, J.

not necessary to sustain the demurrer and dismiss the proceeding on that ground. But under our liberal practice as to the form of actions the petition could be treated as in the nature of a complaint. The issues could be framed thereunder, and the cause tried without requiring another statement of the same facts under some other form or name. If it developed that it was not properly a probate proceeding, it would not be treated as such. We think the court did not err in overruling the demurrer and in refusing to dismiss the petition."

The same reasoning applies here. When the court, which has jurisdiction over both equitable and law proceedings, discovered in the complaint the statement of facts which formed the basis of the controversy between the litigants, he should have proceeded to settle the issues, and not have dismissed the plaintiffs out of court and imposed upon them the delays, costs, and annoyance of bringing another suit, which would necessarily have been based upon the same statement of facts; for at all times, if the plaintiffs had a cause of action at all, it was based upon the contract or lease, coupled with the part performance alleged. The principle evidently sought by the legislature to be engrafted upon our procedure is intelligently stated by Mr. Pomeroy in his work on *Equity Jurisprudence* (2d ed.), § 183, where it is said:

"The fundamental principle of this reformed system is, that all distinctions between legal and equitable actions are abolished, the one 'civil action' is the single judicial means of enforcing all rights in a court clothed with both jurisdictions of law and of equity in combination, and in this civil action legal and equitable primary rights, causes of action, and defenses, may be united, and legal and equitable remedies may be obtained. In applying this principle, the following results have been well established: Whenever a plaintiff is clothed with primary rights, both legal and equitable, growing out of the same transaction or condition of facts which thus constituted a cause of action, and is en-

titled thereon to an equitable remedy, and also to a further legal remedy based upon the supposition that the equitable relief is granted, and he sets forth all these facts in his petition, and demands a judgment awarding both species of relief, the action will be sustained; the court will, in its judgment, formally grant both the equitable and the legal relief."

And again in § 87:

"Wherever the reformed procedure has been administered according to its plain intent, the necessity of this double judicial proceeding has been obviated; indeed, if the true spirit of the new procedure is accepted by the courts, such a separation of equitable and legal rights and remedies, and their prosecution in distinct actions, will not perhaps be allowed. The plaintiff brings one civil action in which he alleges all the facts showing himself entitled to both the equitable and the legal reliefs needed to complete his legal right, and asks and obtains a double judgment, granting, first, the proper equitable remedy, and secondly, the legal remedy, by which his juridical position with respect to the subject matter is finally perfected."

There was sufficient testimony in the case for the consideration of the court or jury on the question of agency and of part performance. We do not, however, agree with the contention of the appellants that they are entitled to judgment because the sufficiency of the evidence was challenged by the respondent. Nor do we think this court has ever held such a doctrine. It has been the universal practice, which, so far as we know, has gone unchallenged, that, where a motion of this kind has been overruled, the defendant either stood upon the motion or proceeded with the introduction of his testimony.

The judgment will be reversed, with instructions to the lower court to try the cause and determine the issues.

REAVIS, C. J., and ANDERS, MOUNT, FULLERTON, HADLEY and WHITE, JJ., concur.

Sept. 1902.]

Syllabus.

[No. 4254. Decided September 23, 1902.]

80	81
36	342
39	81
40	37

**W. H. DRAKE et ux., Respondents, v. CITY OF SEATTLE,
Appellant.**

**MUNICIPAL CORPORATIONS — EXCAVATIONS IN STREETS — DUTY TO
GUARD — NOTICE OF CONTRACTOR'S NEGLIGENCE**

The duty to properly guard excavations in streets, although the work is carried on by an independent contractor, rests primarily upon the city; hence actual or constructive notice to the city that the contractor had failed to protect the public against an excavation by placing guards or signal lights there is not necessary in order to render the city liable for the non-performance of that duty.

SAME — CONTRIBUTORY NEGLIGENCE.

The question of plaintiff's contributory negligence in falling into a street excavation was one for the jury, where the evidence showed that plaintiff knew holes were being dug in the street in front of her house, but did not know their exact location, nor that there was a hole at the place where she fell, since there was nothing to indicate its presence, either in the way of barriers, lights or loose dirt; that the excavation was at the intersection of the street on which she lived and a cross street along which a car line ran; that in attempting to board a car at the street intersection she fell into a hole between the tracks, not having heard the warnings called out to her until she was falling and without having noticed there was an opening there.

SAME — VERDICT CONTRARY TO INSTRUCTIONS — HARMLESS ERROR.

The fact that the jury's verdict was contrary to an instruction charging them that the city was not negligent, if it used reasonable care to discover the dangerous condition of the street and the accident intervened before the lapse of a reasonable time between the discovery and the remedy of the defect, was not error, inasmuch as the city was chargeable with the primary duty of guarding excavations in its streets, and the neglect of the persons to whom that duty had been intrusted was the neglect of the city.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Affirmed.

W. E. Humphrey, Edward Von Tobel and Mitchell Gilliam (John P. Hartman, of counsel), for appellant.

George E. Morris, for respondents.

The opinion of the court was delivered by

FULLETON, J.—The respondents, who were plaintiffs below, are husband and wife. They brought this action to recover for personal injuries received by the wife from a fall into an opening made in one of the public streets of the city of Seattle by certain persons who were engaged under a contract with the city in laying a sewer therein. In laying the sewer the contractors did not dig a continuous trench or ditch along the surface of the ground, but dug a series of openings certain distances apart, and connected these by running tunnels from one to the other beneath the surface. The opening into which the injured respondent fell was made between parallel street car tracks near the intersection of a cross street, where the street cars stopped for passengers to get on and off, and was some four feet wide, sixteen feet long, and twelve feet deep. The accident occurred about seven o'clock in the evening, and after it had become quite dark. A street car, on which the respondents intended to take passage, came along the street, stopping opposite the opening. As the respondents approached the car, the injured respondent noticed a vacant seat on the side of the car next to the opening, and, hastening to reach it, started down between the car tracks, and, failing to heed, or, perhaps, understand, the warnings which were given when her movements were observed by those having knowledge of her danger, fell into the opening, receiving the injuries complained of. The excavation at that time was without lights or barriers of any kind to mark its presence. It appears that the sewer had been in the course of construction for some weeks; that the con-

Sept. 1902.] Opinion of the Court—FULLERTON, J.

tractors had during that time given warning of the several openings during the night time, by placing lights over them on quitting their work at the close of each day; that they failed to put in place the customary lights on the night in question, for some reason not clearly appearing by the record. It further appears that the city officers first learned that the lights were not in place at about the time the accident happened; that they took immediate steps to place them, doing so as quickly as arrangements for that purpose could be made, getting them out at about nine o'clock on the same evening. After the respondents had rested their case the city moved for a nonsuit, basing its motion upon two grounds: (1) That the respondents had failed to show negligence on the part of the city; (2) that the respondent Elizabeth A. Drake was guilty of contributory negligence. The overruling of this motion constitutes one of the errors assigned for reversal.

In support of the first ground of the motion, the learned counsel for the appellant invoke the rule that a city, when it has once properly guarded a dangerous defect or excavation in one of its streets, and such guards have been removed without its consent or knowledge, cannot be held liable for an injury caused thereby, unless it be shown that it had notice, either actual or constructive, of the removal of the guards, and has had a reasonable time thereafter in which to replace them, and argue that the facts of the case before us bring the appellant within the rule. It is contended that because lights had been placed by the contractors to guard the several openings on each night prior to the happening of the accident in question, the city cannot be held liable for that accident without a showing that it had notice, prior to the accident, that the lights had not been put in place on that particular evening in time to have remedied the defect. But it seems to us that the rule in-

voked has no application to the facts shown here. Had it been made to appear that the lights had been put in place on the evening of the accident, and prior thereto, and that they had been removed by some unauthorized person, or by some means other than the city's agency, and unknown to the city, then notice of such removal in time to have remedied the defect might perhaps have been necessary to charge the city with liability. But as lights were depended upon as guards to the excavations, and were put in place during the night time only, there was a recurring duty to so place them on each recurring night, and the city was as much obligated to see to it that they were put in place on the night of the accident as it was at the commencement of the work. The duty to properly guard the excavations, although it was a public work and carried on by independent contractors, rested primarily upon the city. This duty it could not delegate, so as to escape liability for its non-performance as against any person lawfully traveling upon the street. As is said by Judge Dillon, in his work on Municipal Corporations (§ 1027, 4th ed.):

“Whether the duty of maintaining the streets in a safe condition for public travel and use is specially imposed on the corporation, or is deduced in the manner before stated, *it rests primarily, as respects the public, upon the corporation*, and the obligation to discharge this duty cannot be evaded, suspended, or cast upon others, by any act of its own. Therefore, according to the better view, where a *dangerous excavation is made* and negligently left open (without proper lights, guards, or covering), in a traveled street or sidewalk, *by a contractor under the corporation* for building a sewer or other improvement, the corporation is liable to a person injured thereby, although it may have had no immediate control over the workmen, and had even stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neg-

Sept. 1902.] Opinion of the Court—FULLERTON, J.

lect. It is immaterial, as respects the primary liability of the corporation in such a case, whether it has or has not inserted such a clause in its agreement with the contractor."

See also, *Indianapolis v. Marold*, 25 Ind. App. 428 (58 N. E. 512); *Park v. Board of Commissioners*, 3 Ind. App. 539 (30 N. E. 147), and cases cited.

To perform the work contracted for necessarily required the creation of excavations dangerous to public travel, especially travel by night, and hence the city was charged with notice of the necessity for guards or signal lights. Notice, therefore, that the duty of properly placing such guards or signal lights had not been performed, was not required to charge the city with liability for a non-performance of that duty.

From the evidence it appeared that the respondents resided on the street along which the sewer was being constructed, and that Mrs. Drake knew that excavations had been made in the street for that purpose. It also appeared that several persons called to her, warning her of the opening into which she fell, just at the time of or immediately preceding her fall. It is on these facts that the claim of contributory negligence is based. Mrs. Drake's testimony was to the effect that, while she had a general knowledge that holes were being dug in the street in front of her house, she did not know their exact location, or that there was any hole at the place at which she fell; that she had not been out to the car since the work on the street had been begun, and that there was nothing at the place she fell, not even loose dirt, to indicate that a hole had been dug there; and that she heard the warnings at the instant she fell, too late to save herself. And, generally, it can be said that, if her testimony is to be believed, she was not guilty of contributory negligence. Whether, therefore, she was

guilty of contributory negligence was a question for the jury, and the court did not err in submitting that question to them.

The court gave to the jury, among others, the following instruction:

"And even though you find that at the time of the injury, or the alleged injury to Mrs. Drake, that the street where she was injured was in a defective and dangerous condition—even though, I say, you find that fact, yet if you find that the city authorities used reasonable care to discover that condition, but that the accident or injury to Mrs. Drake happened before a reasonable time had elapsed after that discovery by the city authorities, in that event you would not be justified in finding that the city was guilty of any negligence and your verdict would have to be for the defendant."

It is said that the verdict of the jury was in direct violation of this instruction, as the evidence is all to the effect that the city did remedy the defect as soon as it was possible to do so after notice had been given it that the excavations had not been guarded on the particular evening the injury occurred. But, as we have said, the city was charged with the primary duty of guarding these excavations, and that the neglect of the persons to whom it had intrusted that duty was the neglect of the city. However applicable the instruction may have been to other facts of the case, it was wholly inapplicable to that branch of it to which it is here sought to be applied, and error cannot be predicated because the jury did not so apply it.

Finding no substantial error in the record, the judgment will stand affirmed.

REAVIS, C. J., and HADLEY, DUNBAR, MOUNT, ANDERS and WHITE, JJ., concur.

Sept. 1902.]

Syllabus.

[No. 4252. Decided September 25, 1902.]

ANDREW GREEN, Appellant, v. WESTERN AMERICAN COMPANY, Respondent.**COAL MINING — TIMBER FOR PROPS — DUTY OF OPERATOR TO SUPPLY — NEGLIGENCE OF MASTER — ASSUMPTION OF RISK.**

Under Bal. Code, § 3178, which provides that the operator of a coal mine shall supply the workmen therein with timbers sufficient to properly secure the workings from caving in, and these shall be delivered at the entrance of the working place, a positive statutory duty is imposed upon the operator of the coal mine, and where a neglect of such duty proximately contributes to an injury received by a miner, the operator is liable, even if the miner continued work after knowledge of the failure to supply the timbers, since the doctrine of assumption of risk is inapplicable in the face of the positive injunction of the statute.

SAME — INJURY TO MINER — CONTRIBUTORY NEGLIGENCE.

Whether a miner was guilty of contributory negligence in working in a crosscut of a coal mine, after the discovery of rock in the roof of the crosscut, which he could not timber against because of a failure to supply him with the necessary material therefor, is a question for the jury, when there was no showing that the danger was so obvious and imminent that no ordinarily prudent man would assume the risk.

SAME — EVIDENCE OF GEOLOGICAL FORMATION.

Evidence showing the natural condition of a coal mine, as regards its geological formation, is competent and material in an action by a miner to recover for injuries received from an accident therein, for the purpose of establishing his surroundings, the care necessary to be taken by him, and the care the operator should take in timbering and operating the mine.

SAME — WITNESSES — EXAMINATION.

The refusal of the court to allow plaintiff on his re-direct examination to testify as to whether it was rock or coal that fell upon him was not an abuse of discretion when he had not been questioned on that point on direct examination.

SAME — INCOMPETENCY OF VICE PRINCIPAL — EVIDENCE.

Where the complaint charged as an element of negligence the employment of an incompetent pit boss, evidence was competent and material, showing the duties of a pit boss as to inspecting the

30	87
31	474
30	87
32	69
33	176
30	87
32	450
33	451
32	452
33	457
32	459
33	466
32	467
33	472
30	87
40	288
30	87
41	155
41	166
41	401

Opinion of the Court.—WHITE, J.

[30 Wash.]

working places, keeping the chutes clear of coal, timbering for the purpose of keeping rocks from falling, and repairing defects when complained of; as to the extra hazardous work in unblocking clogged chutes and the selection by the pit boss of inexperienced men therefor; as to the discharge of miners on calling the attention of the boss to the omission to make repairs; as to the general complaint of the inability to get sufficient timbers to properly prop their working places; and as to the general reputation of the pit boss for incompetency and disregard for the lives and limbs of the miners.

SAME — PROOF OF SPECIFIC ACTS.

Specific acts of incompetency of the pit boss were admissible in evidence under the general allegation that he was ignorant and incompetent.

MASTER AND SERVANT — NOTICE OF INCOMPETENCY OF EMPLOYEE.

The master will be presumed to know the incompetency of a pit boss when specific acts of incompetency are shown, of such a nature, character and frequency that the master, in the exercise of due care, must have necessarily had them brought to his notice.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Reversed.

Govnor Teats, for appellant.

Fogg & Fogg, for respondent.

The opinion of the court was delivered by

WHITE, J.—This is an action for personal injury, brought by Andrew Green, a coal miner, against the Western American Company, owner and operator of the Fairfax mines, Pierce county, Washington. Nonsuit was granted by the court below, and the plaintiff appeals.

There were two general elements of negligence charged in the complaint—the employment of an incompetent pit boss, and the neglect of the defendant to furnish the plaintiff with timbers to properly timber his working place, as provided by § 3178, Bal. Code. The second amended complaint, charging negligence, is as follows:

Sept. 1902.] Opinion of the Court.—WHITE, J.

"That some time prior to the 18th day of September, 1900, the defendant employed the plaintiff to mine coal in its mines at Fairfax. After his employment plaintiff set to work driving a crosscut in said mine, which crosscut was to be driven between two chutes for a distance of about 70 feet. That on or about the — day of —, plaintiff had driven the said crosscut at a distance of about 25 feet, and then and there requested of the pit boss, John Wilson, for timbers to properly prop the same, and quit work because of the lack of timbers to properly timber the said crosscuts so mined by plaintiff.

"That thereafter the said pit boss caused to be furnished to plaintiff timbers to properly timber and prop said chute for about 20 feet, and the plaintiff proceeded to work, and drove the said crosscut further on towards the chute on the opposite side of the pillar. That after driving the same a distance of about 18 feet, it became necessary to timber and prop the said crosscut so as to protect plaintiff from falling coal and rock, and there and then requested the pit boss, Wilson, to furnish him with timbers to be used as props to properly secure the workings from caving in; and plaintiff alleges that there was at that time no timbers, or any supply of timbers in said mines to supply the plaintiff at the entrance of his working place, or at any place where plaintiff could obtain the same, as is required by the laws of the state of Washington. The said Wilson then and there requested the plaintiff to proceed to his working place, stating to the plaintiff that the same was safe and did not need and require timbers to prop, and requested the plaintiff to continue driving the crosscut until it reached the chute on the other side of the pillar, when the defendant would furnish the plaintiff with timber to properly timber and prop the said crosscut.

"That plaintiff then and there went back to his place of work and continued to work until about 1 o'clock on the 18th day of September, 1900, when a rock or block of coal fell, by reason of the lack of timbers and the lack of proping, striking the plaintiff upon his head and back and body, fracturing his spinal column and maiming and wounding him, so that plaintiff became paralyzed from the

Opinion of the Court.—WHITE, J.

[30 Wash.

pit of his stomach, and the lower portions of the bowels, and all of the muscles and portions of the body, and limbs below the said point so injured, to-wit: the center of the back and the pit of the stomach.

"Plaintiff alleges that it was the duty of the said pit boss, John Wilson, to furnish the said timbers as herein set out for and on the part of the said company for the purpose of making the places reasonably safe as provided by law; that the plaintiff and other miners in the said mine looked to the said pit boss, John Wilson, for the fulfillment of the said duty to the plaintiff and miners in the operation of the said mine.

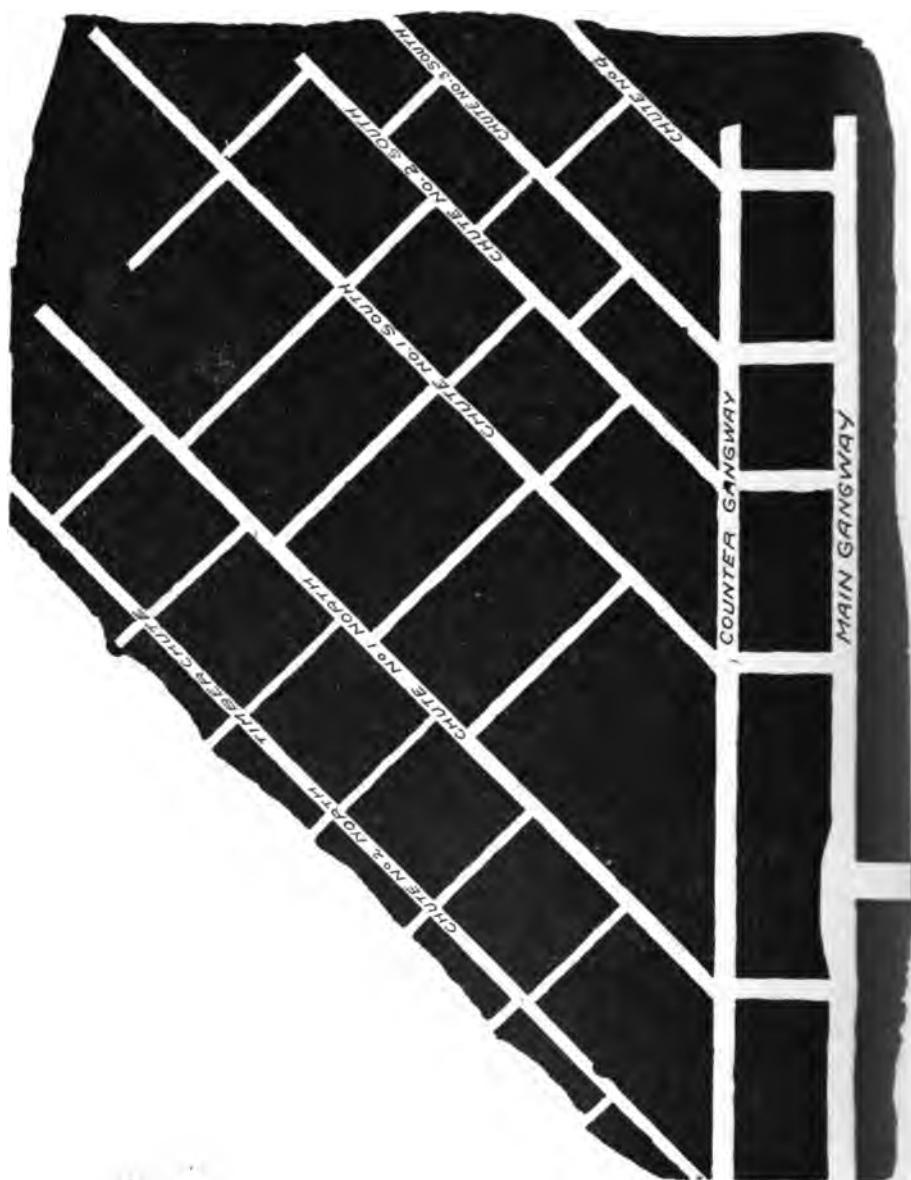
"Plaintiff alleges that the said pit boss, John Wilson, at the time of his employment and at the time of the accident, was an ignorant, incompetent person, totally unfit to act as foreman or take charge of underground work in a mine. That he had no knowledge of men and no knowledge of mining, and did not know what was necessary to be done in the operation of the said defendant's mine in order to maintain reasonably safe places underground for the men under his charge. That the said John Wilson was wholly ignorant of the geological formation of the earth and vein in which defendant's mine was located, and did not know what was necessary to be done in order to have and maintain reasonably safe working places under ground for the plaintiff and operators therein. That the said company knew full well that the said John Wilson was so incompetent and irresponsible at the time of the accident to the plaintiff and for a long time before, but that this plaintiff did not know of said character and incompetency of the said John Wilson, and that the injuries of the said plaintiff are due to the negligence and carelessness of the said defendant in employing the said pit boss, and in said defendant's refusing and neglecting to furnish him with the necessary timbers at the entrance of his working place."

Upon these allegations issues were formed, and the cause was tried. At the close of the appellant's testimony a motion for nonsuit was interposed by the respondent, and the motion was sustained. The ruling of the court in this

Sept. 1902.] Opinion of the Court.—WHITE, J.

respect is assigned as error. The evidence discloses that the appellant was a practical and experienced miner. The Fairfax mine consists of three veins, which extend north and south practically, and pitch from sixty to sixty-nine degrees. The entrance is made from the bank of the bluff as it goes out to a river. The coal measures lie about 1,000 feet back from the river, and they run diagonally with the course of the river. The main entry or tunnel starts from the gravel bank near the river, and its main direction is nearly northeast. It is sometimes called east and west by the miners. As one goes into the tunnel, the south would be on the right hand and the north would be on the left of the course. The veins are tapped by a tunnel from beneath, so that when a miner reaches the vein he practically turns around to go up into the working. The following is a diagram of the working:

Opinion of the Court.—WHITE, J.[30 Wash.



Sept. 1902.] Opinion of the Court.—WHITE, J.

The chutes running up into the coal number from the entrance of the tunnel north and south. The first chute on the cut to the left is chute 1 north. The chutes to the right are chutes 1 to 4, inclusive, south. At a distance of 30 feet up from the gangway a counter gangway is driven. The chutes reaching the counter gangway are driven practically at right angles with the gangway, and the chutes extending from the counter gangway up into the coal are driven at an angle from the counter gangway of about 40 to 45 degrees, as is necessary in order to work the mine on account of the pitch of the vein. Crosscut No. 5, between chute No. 1 north and chute No. 1 south, counting from the counter gangway, was the place where Green was injured, and was 230 feet from the counter gangway, which would make it about 260 feet from the main gangway up chute 1 south. The chutes are driven from 3 to 5 feet wide and 5 feet high. The difference in the width is due to the thickness of the vein of coal, being driven up through the coal at an angle. The bottom and top of the coal form the two sides of the chutes. The terms for the rock formation, used in the evidence, are the "hanging wall" and the "foot wall." The top and the bottom of chutes and crosscuts were coal. The reason the rock walls were designated the "hanging wall" and the "foot wall" is because of the pitch of the vein. The distance between chutes was generally about 30 feet, but that between chute 1 north and chute 1 south was about 70 feet. The distance between crosscuts was from 30 to 40 feet. The vein of coal pinches out near the surface, and runs into the gravel, which was about 40 feet above the fifth cross-cut. As the miners reached the top of the vein, it was found that the coal became softer, and was not solid as below. John Wilson was pit boss. When Green commenced working, he worked in No. 1 vein, called the

Opinion of the Court.—WHITE, J.

[30 Wash.]

"Blacksmith" vein, five days; then went to work in the third vein, and worked in the crosscuts between chute 1 and chute 2 south. While working there, his timbers were packed to him at the entrance of the chutes below at the intersection of the gangway. He was then sent to work driving crosscut No. 3, between 1 north and 1 south, which was about 70 feet through. He drove that through, and also crosscut No. 4, and while driving those through he was instructed to drive clear through first and timber down afterwards, as the timber came from the chutes north, and he got his timbers for those crosscuts through chute 1. The pit boss told him to drive through and timber back, and that is the way he mined and timbered crosscuts 3 and 4. He then proceeded to drive crosscut 5, and drove about 25 feet, when he called for timbers. Receiving none, he quit, laid off two days. This was owing to the coal being more or less soft, and he wanting to timber. The boss then told him to go through crosscut 4, and get his timbers in No. 1 chute north. He did so, and timbered up 20 feet in crosscut No. 5. He then proceeded and mined 18 or 20 feet more. The day before the accident, and after firing a shot, toward evening, he came down to the chute, and met Wilson, and requested of Wilson timbers to timber his crosscut up. Wilson told him that he had ordered the timber packers to bring him timbers, but Green "never got a stick." Wilson went up into the place, and then came down, and repeated that he had told the timber packer to bring the timbers, and requested Green to drive on through the same as he had the other chutes, and to timber back.

"Q. What else did he [Wilson] say? A. 'Well,' he said, 'I told them timber packers to bring you lots of timber, but go ahead and drive it through, and when it comes through up here, timber it up again.'"

Sept. 1902.] Opinion of the Court.—WHITE, J.

Soon after Wilson left, Green went home. In the morning, about a quarter to seven, he went in to work, and met pit boss Wilson at the powder magazine, where it was Wilson's duty to hand out the powder to the men as they needed it for their work in the mine; and then again Green told Wilson that he needed timbers to timber his crosscut, and Wilson told him that he would be up there. Green then went up to his place, and first put up some canvas brattice, which took about one hour. He then went up to pick or mine out the coal loosened by the blast, and, after taking out the heel of the shot, found in the face of his working or crosscut, for the first time, a rock, which took up about half of the space in the face, ran from stone wall to stone wall, and extended down into coal two and a half feet. After digging awhile and discovering the rock, he went down into the old workings, to see if he could not find some timbers, and found nothing but a round piece of canvas stick about three inches in diameter and five feet long. He could not get another timber. He then put the stick under the outer edge of the rock, and drove it in hard. The rock in the face was the first of the kind he had seen in the mine. He inspected the rock in the usual way, examined it very closely to see if there were any cracks, sounded the parts of the rock to see if it was solid, and found the rock was practically solid. He did not see anything very dangerous; did not know it was unsafe. He could not tell what was in the coal back of the face, and did not know of any danger. The following is a part of the cross-examination:

"Q. When did you first encounter this rock? The day you were hurt or before that? A. Yes, sir; the day I was hurt. Q. What time of day? A. What time of day I got hurt? Q. Yes, sir. A. About one o'clock. Q. What I mean is, when did you first come to this

rock in your digging up into the crosscut? When did you first find there was a rock in there? A. I don't remember exactly at this time. Q. Some time during the forenoon? A. I think so. Q. And how long were you at work around that rock, now, before, you quit work there, would you say? A. Not very long. The point on my drill hole extended under that rock a little, and so the coal was soft in there. Q. When did you drill into the coal under this rock, with reference to the time you went down and got the timber? Did you drill in before or after you got this timber? A. I fired that shot the day before. Q. Did you fire any shot the day you were hurt? A. No, sir. Q. Why didn't you? A. I didn't have time. I got hurt too quick. Q. Well, you were there all the forenoon? A. Yes, sir. Q. But you never fire until you go home? A. Hardly. Sometimes you do, but generally you don't. Q. You generally fire the shot in the evening? A. Yes, sir. Q. So that the smoke will have gotten out by the next day after? A. Yes, sir. Q. You say the night before you got hurt the point of your drill struck the rock? A. It never struck the rock. Q. It never struck the rock? A. No, sir. I drilled my hole a foot from the bottom. Q. When did you first know the rock was there? A. I knowed it the same day I was hurt. Q. After you first discovered the rock how long did you keep at work taking coal from under it, would you say? A. Perhaps a couple of hours. Q. Perhaps a couple of hours? A. Yes, sir; perhaps. I cannot remember very well. Q. Now that is the rock that fell on you and hurt you, is it? A. I don't know. I don't think this is the one that broke my back. Q. What do you think about it? A. Well, I know it's not any rock from there that broke my back. I know that. Q. You say the occasion of your quitting finally was that your light became poor? A. Yes, sir. Q. Very often you have to fix up your lamp? A. Yes, sir. Q. And you were going out; were you going to fix your lamp? A. Just away from the face a-ways. Q. You were at work there at the face at the time. A. Yes, sir. Q. There you stepped back, you think, about six feet from the

Sept. 1902.] Opinion of the Court.—WHITE, J.

face? A. Yes, sir; I backed out. Q. What is the first you can recollect that you had of this rock coming on? A. Sir? Q. What did you hear first about this rock falling on you. A. I didn't hear nothing. Q. The first thing you knew you were hit? A. Yes, sir. Q. And you were then about six feet from the face? A. Yes, sir; as near as I can judge. Q. What became of your prop? A. I think the prop is there yet. Q. You think the prop is there yet? A. Yes, sir. Q. Did the prop give way when the rock gave out? A. No, sir. Q. You are pretty positive you were about six feet from the face when you were struck? A. Yes, sir. Q. Now, what happened when you were struck? What effect did it have on you when you were struck? A. It doubled me up pretty much. Q. Where were you hit? A. Right across my shoulders. Q. Right across your shoulders? A. Yes, sir. Q. Could you tell how large a rock it was that hit you? A. No, sir. Q. Could you form any estimate about it? Was it a big rock. A. I could not tell. I seen the rock down below. When Mr. Wilson, the pit boss, picked me up he asked me if it was that rock. I told him it might be. Q. What sort of a looking rock was that? A. I cannot remember. Q. How big a rock was that? A. Oh, I couldn't tell. Q. Was it a couple of feet square? A. I could not tell you. Q. Give the jury some idea about how big it was as near as you can tell. A. I seen a corner sticking out of the rock there; perhaps it was a foot long; and the corner pointed like. It was not square; not round. Q. Sort of ragged, jagged looking rock? A. Yes, sir. Q. Well, when this rock struck you on the shoulder did it knock you down? A. Yes, sir. Q. And did you slide then clear down to the chute? A. No, sir. I slid perhaps five or six feet more and then I stopped myself. . . . Q. That would take you about ten or twelve feet from the face? A. Yes, sir; something like that. Q. And then another rock came down? A. Yes, sir, immediately. Q. And pushed you on down to the crosscut? A. Yes, sir. Well, after the second rock struck me I got up because I thought the whole thing was going to fall

Opinion of the Court.—WHITE, J.

[30 Wash.

so that I made my last struggle and got up on my feet. Q. Now, tell the jury—explain to the jury how you were lying or sitting after you slid down here three or four or five feet after the first rock hit you. A. I was lying very much cross ways as I remember, when the second rock struck me. Q. With your face down to the floor of the crosscut? A. No, sir. My face towards the hanging wall and my feet towards the foot wall. Q. Was your head more up towards the face of the entry than down towards the chute? A. I think it was. Q. And the second rock slid down the crosscut and struck you on the small of the back? A. I think it dropped down. Q. You think it dropped down and struck you in the small of the back? A. Yes, sir. Q. Do you know whether it dropped down or slid down? A. I could not hear nothing sliding. Q. So that it must have dropped? A. Yes, sir. Q. Could you hear it when it left, wherever it started from? A. No, sir. Q. You have no recollection of that? A. No, sir. . . . Q. What had become of the two rocks that hit you? Had they gone down the crosscut or were they still against you? A. I could not tell you. One of them slid down. Q. Before you went down? A. I could not tell. . . . Q. You have not a very distinct recollection of what took place? A. I remember very well, but I was mostly delirious."

There was testimony tending to show that "niggerheads" falling from the roof would give no warning. The cause of appellant's lamp getting out of order was that it struck against the damp surface of the rock he was working under. The chute from below his crosscut was almost filled with coal, which was the only thing that prevented him from going down the chute the entire distance of 230 feet. The purpose of timbering is to protect the roof from caving and the miners from being injured, and niggerheads from falling out of the coal unexpectedly. It was the company's duty to furnish the timbers at the entrance of appellant's crosscut No. 5, just above it, so the coal

Sept. 1902.] Opinion of the Court.—WHITE, J.

would not strike it as it went out of his crosscut. There was no custom in this mine and no rule as to timbering. There were no timbers near crosscut No. 5, and no timbers were furnished Green, as he had requested. There is always more or less danger in a mine, and sometimes one may think himself safe when he is not. It was the duty of the pit boss to inspect the mine and the places; to inspect for falling rock, and to clear the chutes of coal; to see that the timbers and props were delivered to plaintiff and the other miners. Miners do their own timbering. That is part of their contract, and they receive no pay for it. It is as cheap for them to timber first as last. Appellant testified that, if he had had timbers, he would have kept his place well timbered to the face; would have put up his timbers every day, especially in this crosscut, as the coal was soft, and more likely to fall. But he had confidence in the pit boss and in his experience, and thought he would be safe in mining there as requested by the pit boss. He did not stop and go home because the pit boss told him to go through. As he states: "I didn't think it was dangerous. If I had thought it would be dangerous, and I get hurt this way, do you think for a moment that I would stay there and get hurt? No, never." Whether it is safe or not to mine without timbers depends upon conditions. In mining coal the miners quite frequently come across places such as Green found in the face. It would have been safe for Green to do just as he did with a flat rock—after tapping, and finding it to be solid, to proceed to work. A flat rock will disclose breaks or other dangers by the tapping or sounding. It was not carelessness for Green to work around the rock as he did until the boss should come as he promised. The danger was not so imminent and immediate, under all the conditions, in crosscut 5, but what a reasonably careful man

Opinion of the Court.—WHITE, J.

[30 Wash.]

would have done just as Green did. A man could work seven weeks if a rock was solid. A portion of the testimony relative to the furnishing of timbers was as follows:

"Q. Tell how you happened to get them up in there.
A. The mining boss told me to drive through there and timber down through there for this crosscut. Q. Did you have any conversation with the mining boss about that?
A. Yes, sir. Q. Tell the jury about it. A. He told me to timber up after I drove through. . . . He [Wilson] said: 'I told the timber packers to bring you up some timber,' and I never had a stick. . . . And he said, 'I told them timber packers to bring you lots of timber,' but I didn't have none, not one. . . . Q. Were there any timbers anywhere near crosscut No. 5 at the place you got hurt? A. No, sir; there was not. Q. What talk did you have with him? A. I told him we needed some timbers. . . . He said, 'I will be up there.'"

Appellant testified that the timbers should be delivered at the entrance of the crosscut where one was working; that he applied to Wilson down in the gangway for timbers on the morning of the accident, and complained that he had no timbers.

"A. After I had gone into that rock about a foot I went down into the old works and knocked out an old timber and put that under the rock, that flat rock. . . . Q. Did you take with you more than one timber? A. No, sir; I could not get hold of any more timbers. I brought some laggings with me from this chute up there. . . . I asked him for timbers, and always requested for timber. . . . Well, I done all I could. I went and knocked out my own timber and put it out. I could not do any more. . . . It was the best thing I could get and I think it was plenty strong enough to hold that flat rock. . . . Q. When you drive you call for timbers? A. Yes, sir. Q. Were they furnished you? A. Sometimes they were, and most of the time they were not. . . . Q. Now, I want to ask you about the

Sept. 1902.] Opinion of the Court.—WHITE, J.

timbers, Mr. Green. Is it not true that there were timbers, three or four timbers, right near the bottom of your crosscut? A. No, there was not. Q. And did you crawl over those timbers after you slid or was thrown down your crosscut? A. No, sir. Q. And did not your dinner pail hang right over or nearly over those perpendicular timbers? A. There were no timbers there except that old canvas stick I brought up chuck full of nails, and they hurt me awfully, but I could not get them out. Q. When you went to get your lunch, didn't you sit on timber right at the bottom of your crosscut to eat your lunch? A. No, sir; I had no timbers there; I could not sit on no timbers. Q. And were there not plenty of timbers, say, at the lower entrance of crosscut No. 4? A. No, sir; and if there had been I could not have got them; but there were none there. Q. How do you know? A. Because I took the last and put them up there. Q. When? A. When I timbered up. Q. When? How many days before you were hurt? A. About two days and a half. Q. About two days and a half? A. Yes, sir. Q. And did you not know whether timbers had been delivered below there in the meantime or not? A. No, sir; I didn't know, but I didn't think so, because I could not get them, and the mining boss told me to drive through and get more timbers. Q. When were you down here at that place? A. I was down there two and a half days before I got hurt. Q. You were not there afterwards? A. After I got hurt? Q. You were not there after two days before? A. No, sir. Q. And whether the timbers were delivered there at that time or not you do not know? A. No, sir. Q. Why didn't you go and see? A. How can I go when there was a six or seven inch opening there? When I got the timbers before, I had to buck the coal down; it took me a long time to buck the coal down; I had to creep on my back and take the timbers in that way."

"The owner, agent or operator of any coal mine shall keep a sufficient supply of timber at any such mine where the same is required for use as props, so that the workmen may at all times be able to properly secure the said work-

ings from caving in, and it shall be the duty of the owner, agent, or operator to send down into the mine all such props when required, the same to be delivered at the entrance of the working place." Bal. Code, § 3178.

Under this section the operator of a coal mine is required to keep a sufficient supply of timber to be used as props, so that the workman, needing the timber to properly secure his work from caving in, shall have it at hand. The operator must not only keep the timber for that purpose, but he must send it down into the mine, and deliver it at the entrance of the working place. The evidence tends to show that the entrance to the particular working place in which the appellant was working was the upper side of chute No. 1 south, where crosscut 5 intersected said chute, and under the law this is the place at which the props should have been delivered. This regulation is a wise one, and the court should endeavor to uphold it by all reasonable construction. The purpose of the law is to provide a reasonably safe place for the men to work in, and that the working places mined out where the men are compelled to go or work shall be timbered by the men as they mine the coal away, so as to keep the same from caving in, and to make it reasonably safe from the inherent dangers. The falling of rock and coal is one of the inherent dangers that produces a large percentage of all the accidents, and this law was passed for the purpose of reducing the number of accidents as far as possible. It is a positive duty imposed upon the operator, and for a neglect of this duty, which proximately contributed to the injury, the company is responsible. The general duty imposed by law upon the master is to provide a suitable and reasonable place for the doing of the work to be performed by the servants, and an adequate supply of sound and safe materials, implements, and accommodations, with such other appliances as may

Sept. 1902.] Opinion of the Court.—WHITE, J.

reasonably be required to insure their safety while at work. When the statute prescribes the measures that shall be taken by the operator of a coal mine to render the place safe where the miner is working, it imposes a specific duty upon the master, which he must perform to escape the charge of negligence. The law has regard to the hazardous nature of the employment in imposing this duty upon the operator of the mine, the object being to secure a reasonably safe place for the workmen in the mine. The test and measure of duty is the command of the statute. *Sommer v. Carbon Hill Coal Co.*, 89 Fed. 54 (32 C. C. A. 156). The general duty is also imposed upon the operator to see that the working places in the mine where props are necessary to keep the mine from caving in are propped, and that the working places are frequently inspected to ascertain whether the props are put up; and to see that the workmen put up the props as their work progresses. A failure to do this is negligence. To do this is the exercise of a reasonable precaution, and reasonable precautions must be taken to secure the safety of the workmen. The workmen have a right to look to the master for a discharge of this duty. Failure to take such precaution is negligence. *Costa v. Pacific Coal Co.*, 26 Wash. 138 (66 Pac. 398); *Shannon v. Consol. Tiger & Poorman Min. Co.*, 24 Wash. 119 (64 Pac. 169).

If the statute as to furnishing props had been complied with, would the injury have occurred? From the evidence it is fair to presume that, if the props had been furnished, the place where the appellant was injured, some twelve feet from the rock he was digging under, which was exposed by the blast set off the evening before, would have been roofed over. There is evidence tending to show that the rock that injured him fell out of the roof, and that he did not know of its presence in the roof. If he was

Opinion of the Court.—WHITE, J.

[30 Wash.

injured by a rock or block of coal falling from the roof, that would have been timbered if the company had performed its duty, then the danger was one of the risks of his place contemplated in the law. The rock did not fall because of any act of Green, but it fell through the lack of props—the violation of the law by the company. It cannot be said that appellant should have left the place because the danger was imminent, for the evidence tends to show that he did as other miners have and would have done, and acted in the practical and customary way; that he was requested by the pit boss to drive on through to the other side, and timber back; and if the jury should find such assurance was made, and the danger was not so imminent but what a reasonably careful man would do as appellant did, then he was not guilty of negligence in proceeding as he did. He did not know the exact danger in the roof, and, if the rock fell from the roof, he did nothing to bring it down upon him.

In passing upon a statute of Indiana similar to the one under consideration, in *Harder, etc., Min. Co. v. Schmidt*, 104 Fed. 282 (43 C. C. A. 532), the court said at page 285:

“Whatever may be the exemption of the employer from liability for injuries caused by a danger that is obvious to the injured, such exemption will not be accorded where the nature of the menace is so uncertain as to cause discussion between the employees and the employer, with the result that the employer dissuades the employee of his apprehension; . . . ”

In *Gundlach v. Schott*, 192 Ill. 509 (61 N. E. 332, 85 Am. St. Rep. 348), it was held:

“It is well settled that, even though the plaintiff knew of the defect, if the master ordered him to proceed with the dangerous work he did not assume the risk of so doing, unless the danger was so manifest that a person of ordin-

Sept. 1902.] Opinion of the Court.—WHITE, J.

ary prudence and caution would not have incurred it. 'Even if the servant has some knowledge of attendant danger, his right of recovery will not be defeated, if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances. When the master orders the servant to perform his work the latter has a right to assume that the former, with his superior knowledge of the facts, would not expose him to unnecessary perils. The servant has a right to rest upon the assurance that there is no danger, which is implied by such an order. The master and servant are not altogether upon a footing of equality. The primary duty of the latter is obedience, and he cannot be charged with negligence in obeying an order of the master unless he acts recklessly in so obeying. Whether he acted thus recklessly in obeying his master's order, or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury.' *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447 (44 N. E. 876); *Offut v. World's Columbian Exposition*, 175 Ill. 472 (51 N. E. 651)."

See, also, *Myrberg v. Baltimore, etc., Reduction Co.*, 25 Wash. 364 (69 Pac. 539).

It is true that the appellant was a practical miner. He knew there was danger of falling rock from the unroofed crosscut. He knew the coal was soft. Under ordinary circumstances, without assurance from his employer and obedience to his employer's order, he might be said to have assumed the risk of the injury that overtook him. Does the statute we have cited change the ordinary rule? We think it does. While it is the ordinary rule that the workman assumes the known dangers resulting from negligence of the positive common-law duty on the part of his employer when he continues at work, that rule of law cannot apply to the violation of a statutory duty. Where the operator of a coal mine violates a statute providing for the furnishing of timbers, for instance, and one is injured

Opinion of the Court.—WHITE, J.

[80 Wash.]

through the fact of the violation by reason of the lack of timbers which should have been furnished, the employer cannot plead assumption of risk, etc., even when the miner knew of the violation. The operator cannot violate a statutory command made for the protection of workmen, and shift his responsibility and liability upon the injured on the plea that the injured one knew the law was violated; especially so when the injured one was doing all in his power before the accident to have his employer obey the law by furnishing the timbers. If this were not so, the law would be a dead letter. The primary object of the statute is to secure the safety of persons employed in coal mines. To apply the doctrine of assumption of risks to the case under consideration would render the law ineffectual to accomplish the object that it was intended should be accomplished by it.

"Every person, while violating an express statute, is a wrongdoer, and is *ex necessitate* negligent in the eyes of the law; and an innocent person within its protection, injured thereby, is entitled to civil remedy by way of damages. *Dodge v. Railroad Co.*, 34 Iowa, 276; *Correll v. Railway Co.*, 38 Iowa, 124; *Small v. Railway Co.*, 50 Iowa, 338." *Mossgrove v. Zimbleman Coal Co.*, 110 Iowa, 169 (81 N. W. 227).

In *Narramore v. Cleveland, etc., Ry. Co.*, 96 Fed. 298 (48 L. R. A. 68), in passing upon a statute of Ohio requiring railroad companies to block the frogs, switches, and guard rails on their track under a penalty of a fine, the court of appeals of the sixth circuit said:

"The sole question in the case is whether the statute requiring defendant railway, on penalty of a fine, to block its guard rails and frogs, changes the rule of liability of the defendant, and relieves the plaintiff from the effect of the assumption of risk which would otherwise be implied against him. We have already had occasion to consider in

Sept. 1902.] Opinion of the Court.—WHITE, J.

a more or less direct way the effect of the statute. *Railway Co. v. Van Horne*, 16 C. C. A. 182, 69 Fed. 139; *Railway Co. v. Craig*, 19 C. C. A. 631, 73 Fed. 642. In these cases we held that the failure on the part of a railway company to comply with the statute was negligence *per se*. A further consideration of the statute confirms our view. The intention of the legislature of Ohio was to protect the employees of railways from injury from a very frequent source of danger by compelling the railway companies to adopt a well-known safety device. It was passed in pursuance of the police power of the state, and it expressly provided, as one mode of enforcing it, for a criminal prosecution of the delinquent companies. The expression of one mode of enforcing it did not exclude the operation of another, and in many respects more efficacious, means of compelling compliance with its terms, to-wit, the right of civil action against a delinquent railway company by one of the class sought to be protected by the statute for injury caused by a failure to comply with its requirements. Unless it is to be inferred from the whole purview of the act that it was the legislative intention that the only remedy for breach of the statutory duty imposed should be the proceeding by fine, it follows that upon proof of a breach of that duty by the railway company, and injury thereby occasioned to the employee, a cause of action is established. *Groves v. Lord Wimborne* (1898) 2 Q. B. 402, 407; *Atkinson v. Waterworks Co.*, 2 Exch. Div. 441; *Gorris v. Scott*, L. R. 9 Exch. 125. In this case there can be no doubt that the act was passed to secure protection and a newly-defined right to the employee. To confine the remedy to a criminal proceeding in which the fine to be imposed on conviction was not even payable to the injured employee or to one complaining, would make the law not much more than a dead letter. The case of *Groves v. Lord Wimborne* involved the construction of a statute quite like the one at bar, and a right of action was held to be given thereby to the injured servant in addition to the criminal prosecution. The courts of Ohio have given the statute under discussion the same construction. *Railroad Co. v. Lambright*, 5 Ohio Cir. Ct. R. 433, affirmed by the su-

preme court of Ohio without opinion, 29 Wkly. Law Bul. 359.

"Do a knowledge on the part of the employee that the company is violating the statute, and his continuance in the service thereafter without complaint, constitute such an assumption of the risk as to prevent recovery? The answer to this question is to be found in a consideration of the principles upon which the doctrine of the assumption of risk rests. If one employs his servant to mend and strengthen a defective staircase in a church steeple, and in the course of the employment part of the staircase gives way, and the servant is injured or killed, it would hardly be claimed that the master was wanting in care towards the servant in not having the staircase which fell in a safe condition. Why not? Because, even if no express communication is had upon the subject, the servant must know, and the master must intend, that the dangers necessarily incident to the employment are to be at the risk of the servant, who may be presumed to receive greater compensation for the work on account of the risk. The foregoing is an extreme case, perhaps, but it fairly illustrates the principle of assumption of risk in the relation of master and servant. Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the current statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers, the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk, and is well supported by the judgments of Lord Justices Bowen and Fry in the case of *Thomas v. Quartermaine*, 18 Q. B. Div.

Sept. 1902.] Opinion of the Court.—WHITE, J.

685, 695. See, also, language of Lord Watson in *Smith v. Baker* (1891) App. Cas. 325, and *O'Maley v. Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119. It makes logical that most frequent exception to the application of doctrine by which the employee who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it. *Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978; *Snow v. Railway Co.*, 8 Allen, 441; *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140. From the notice and the promise is properly implied the agreement by the master that he will assume the risk of injury pending the making of the repair. If, then, the doctrine of the assumption of risk really rests upon contract, the only question remaining is whether the courts will enforce or recognize as against a servant an agreement express or implied on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that."

We do not think, in consideration of the statute cited, that the appellant assumed the risk of his employment in

this instance. The assumption of risk by the employee, which is a matter of contract, is not to be confused with contributory negligence.

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it. Many authorities hold that contributory negligence is a defense to an action founded on a violation of statutory duty, and this undoubtedly is the proper view." *Narramore v. Cleveland, etc., Ry. Co., supra.*

It was for the jury to say whether or not the appellant used reasonable care in working in the crosscut after the discovery of the rock, because we cannot say the danger was so obvious and imminent that no ordinarily prudent man would assume the risk of injury. *Jordan v. Seattle*, 26 Wash. 61 (66 Pac. 114).

From what we have said it follows that the judgment of the court must be reversed, and this case remanded for a new trial. Some of the errors assigned may arise during the progress of the new trial and it becomes necessary for us to pass upon them. The following questions were asked by the appellant, objected to by the respondent as incompetent, irrelevant and immaterial, and objection sustained:

"What is a jump?"

Sept. 1902.] Opinion of the Court.—WHITE, J.

"Is it not a fact, Mr. Puthoff, that in the geological change from a horizontal to an almost perpendicular that where the coal is pinched out as shown by plaintiff's identification No. 2 here, that in that vicinity and for a number of feet below there is a change, and as you reach that gravel—for 100 feet—and as you reach that gravel is there a changed condition in the coal from hard to soft?"

"Would there be any similarity between the coal formation at the place where you drove; that is, between 1 and 2 and No. 5 crosscut, where Green was hurt?"

"How far from the gravel did you drive the crosscut or air way between 1 and 2 south?"

"The condition—a coal vein changes, does it, as to location and place? Answer: Yes, sir. Question: What changes the condition of coal near the gravel, or near a fault?"

All of these questions tended to show the natural condition of the mine in which the appellant was working, his surroundings, the care necessary to be taken by the workmen in working in the mine, as well as the care the company should take in timbering and operating the mine. The condition of the mine in the vicinity of the accident is an important matter for the consideration of the jury. We think all of these questions were competent and material, and that the court erred in sustaining the objections thereto.

The following question was asked the appellant: "What did you say, whether it was rock or coal that fell on you?" This question was competent, but it was not asked on the direct examination of Mr. Green, and the objection to it was that it was incompetent, and was not redirect examination. The last objection was well taken, but it was within the discretion of the court to have allowed the question. We cannot say that the court abused its discretion in refusing to allow it. The following question was asked:

"Whereabouts did you get your timbers when you were working on those angles on the south side?" This was objected to because it was incompetent, irrelevant and immaterial. In some phases of the case this question might have been material. The answer to this might have a tendency to show that it was not the rule in the mine to furnish the timbers at the entrance to the working place, as required by statute. The following questions were asked, objected to, and objection sustained:

"Men in the mine driving chutes are generally paid how?"

"You may state whether or not miners in this particular mine,—in this portion of the mine,—how they worked; whether by contract work, or how they worked."

These questions were objected to as incompetent, irrelevant, and immaterial. If this evidence was material, it was for the purpose of showing the manner of operating the mine. It might have been material for that purpose. If, however, no other errors were assigned, we would not reverse the case on account of the rulings of the court in this particular. The following questions were asked, objected to as incompetent, and objection sustained:

"You may tell the jury what are the duties of a pit boss as to inspecting the working places."

"Mr. Puthoff, you may state what the duties of a pit boss are in relation to keeping the chutes clear of coal."

"You may state, Mr. Puthoff, what the duties of a pit boss are in relation to timbering or fixing the bulkheads for the purpose of keeping rocks from falling down through the chutes."

"You may state, Mr. Puthoff, the duties of a pit boss in relation to repairing defects when complained of."

"You may state, Mr. Puthoff, whether or not when chutes become clogged or blocked, it is extra hazardous work to start them and unblock them."

Sept. 1902. Opinion of the Court.—WHITE, J.

"You may state if you watched the conduct of the pit boss, John Wilson, while you were at work in the mines."

"You may state, Mr. Puthoff, whether or not it was the general complaint in the mine among the men, the miners, to the foreman or the pit boss that they had not sufficient amount of timbers and props at the entrance of their working place to properly timber their places."

We think all these questions were competent, as tending to show the incompetency of the pit boss to superintend the workings in the mine. We think that under the complaint the appellant had the right to show the incompetency of the pit boss, and that the court was not justified in excluding the testimony, which these questions sought to bring out, tending to show such incompetency. For the same reasons we think the appellant should have been allowed to show that it was the duty of the pit boss to see that the coal in the chutes was removed, so that the travel ways or air ways were cleared, and that the pit boss did not perform that duty. The appellant should also have been allowed to show that it was the duty of the pit boss to timber the chutes and crosscuts, and to place bulkheads and other devices for the purpose of keeping rock and coal from running down the chutes; that the pit boss, John Wilson, did not, in the management of the mine, place bulkheads or timbers for the protection of the chutes or crosscuts so as to keep rock from falling down through the chutes, and that by reason of his negligence and neglect of that duty rocks were constantly falling down through the chutes and crosscuts, making it dangerous to miners. The appellant should also have been allowed to show that it was the duty of the pit boss to repair defects in bulkheads and other devices when made, so that the coal above being mined by the miners would not fall on the miners below; that the pit boss did not make such repairs, and, when in-

Opinion of the Court.—WHITE, J.

[30 Wash.]

formed of such defects by the miners below, the miners were immediately discharged; that the pit boss would employ ignorant, inexperienced miners, and would set them at hazardous work in the mine, without informing them of the danger and hazard of such employment, and, instead of informing them of the dangers, would assure them that it was not dangerous. Appellant should have been allowed to show that, when the chutes in the mine became blocked, and starting or unblocking the chutes was dangerous work, the pit boss sent ignorant and inexperienced men to start the chutes, and told them there was no danger. We think appellant should have been allowed to show that it was the general complaint in the respondent's mine that the workmen did not have and could not get a sufficient amount of props and timbers, that they were not delivered to them at the entrance of the working places, and that there was not a sufficient amount of timber to properly prop their working places for the protection of the lives and limbs of the men. Evidence under these offers would have had a tendency to establish the incompetency of the pit boss. It was also competent for the appellant to show that the respondent could, by reasonable care, have known of the incompetency of the pit boss, and of his want of proper supervision over the workmen and the working places in the mine. We think it was also competent to show the general reputation of the pit boss for competency and regard for the lives and limbs of the miners under his charge. The functions and duties of the pit boss made him, under the law, a most important vice principal. The duty of selecting a competent pit boss was as imperative as the duty to furnish proper timbers and props. It will not do, in this sort of a case, to take the narrow view seemingly taken by the court below, that, if the law has been violated, it is immaterial what kind of a vice principal vio-

Sept. 1902.] Opinion of the Court.—WHITE, J.

lated the law, and hence to exclude all evidence of his incompetency. That would be, in substance, telling the operator of a mine, "You may appoint incompetent persons, and place them in charge of the lives of the men you have under ground, and if, by chance, some person is injured because of the violation of a statutory duty, the fact of such an appointment will never be allowed to go to the jury on the matter of your diligence and care for the safety of the men under your charge." A competent pit boss must understand not only the statutory duties imposed upon the operator by law, but the ordinary duties appertaining to such a position.

"The presumption is that the master has exercised proper care in the selection of the servant. It is incumbent upon the party charging negligence in this respect to show it by proper evidence. This may be done by showing specific acts of incompetency, and bringing them home to the knowledge of the master or company; or by showing them to be of such a nature, character and frequency that the master, in the exercise of due care, must have had them brought to his notice. But such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of. So it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of a servant, to leave it to the jury to determine whether they did come to the knowledge of the master, or would have come to his knowledge if he had exercised ordinary care. In such case the presumption that the master had discharged his duty may be overcome to such an extent as to call upon him to rebut the proof made showing his negligence." Bailey, Master's Liabilities for Injuries to Servant, p. 55, and cases cited.

See, also, *Baltimore & O. R. R. Co. v. Henthorne*, 73 Fed. 634 (19 C. C. A. 623); *Davis v. Detroit & M. R. R. Co.*, 20 Mich. 105 (4 Am. Rep. 364) *Hilts v. Chicago & G. T. Ry. Co.*, 55 Mich. 437 (21 N. W. 878); *Gilman*

v. Eastern R. R. Corporation, 10 Allen, 233 (87 Am. Dec. 635); *Gilman v. Eastern R. R. Co.*, 13 Allen, 433 (90 Am. Dec. 210); *Chicago & A. R. R. Co. v. Sullivan*, 63 Ill. 293; *Western Stone Co. v. Whalen*, 151 Ill. 472 (38 N. E. 241, 42 Am. St. Rep. 244); *Driscoll v. City of Fall River*, 163 Mass. 105 (39 N. E. 1003); *Norfolk & W. R. R. Co. v. Hoover*, 79 Md. 253 (29 Atl. 994, 25 L. R. A. 710, 47 Am. St. Rep. 392); *Pittsburgh, etc., Ry. Co. v. Ruby*, 38 Ind. 294 (10 Am. Rep. 111).

Specific acts of incompetency of the pit boss were admissible in evidence under the general allegation that the pit boss was ignorant and incompetent, and under this allegation evidence was admissible that the pit boss did not have regard for the lives of the men under his charge, etc. The matter stricken from the complaint was evidentiary matter, and for that reason the court did not err in striking the same, so long as there remained the general allegation that the pit boss was ignorant and incompetent.

The judgment of the court below is reversed, and the cause remanded for a new trial.

REAVIS, C.J., and DUNBAR, HADLEY, FULLERTON, ANDERS and MOUNT, JJ. concur.

[No. 4122. Decided September 26, 1902.]

J. EUGENE JORDAN, *Respondent*, v. A. D. COULTER *et al.*,
Appellants.

PLEADINGS — ACTION ON WRITTEN CONTRACT — PRIOR NEGOTIATIONS — IRRELEVANCY.

Paragraphs of a pleading containing averments relating to certain alleged oral conversations and agreements between the

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Sept. 1902. Opinion of the Court.—HADLEY, J.

parties to an action were properly stricken as immaterial, where the pleading itself set up a written agreement subsequently entered into concerning the same subject-matter as the alleged previous oral agreement.

FINDINGS OF COURT—SUFFICIENCY OF EVIDENCE.

Where the testimony is conflicting and the preponderance is not clearly against the findings of the trial court, the supreme court will not interfere on appeal.

SPECIFIC PERFORMANCE—UNPERFORMED CONDITIONS.

Specific performance of a contract will not be enforced where any of its conditions remain unperformed on the part of the one asking enforcement.

CANCELLATION OF INSTRUMENT—EQUITABLE JURISDICTION.

Where defendant set up a contract and asked its specific performance, by way of cross complaint to an action against him for conversion, the court is warranted in decreeing a cancellation of the contract when it appears to be nonenforceable, although plaintiff did not ask for such relief, under the rule that, when equitable jurisdiction attaches for any purpose, it extends to the whole controversy.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Ballinger, Ronald & Battle and Humes, Miller & Lyons, for appellants.

Preston, Carr & Gilman, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This action was brought by respondent against appellants to recover the value of 325 ounces of gold dust, alleged to be of the value of \$5,000. It is alleged that the gold dust was received by appellants for safe keeping, to be delivered to respondent, and that appellants so promised to deliver it, but have failed and refused to do so, and have converted the whole of it to their own use. Appellants deny the allegations of the complaint, and further allege by way of cross-complaint,

among other things, substantially as follows: That on the 28th day of May, 1900, the respondent and appellant A. D. Coulter entered into the following written agreement, towit:

"This contract made and entered into by and between J. Eugene Jordan, party of the first part, and A. D. Coulter, party of the second part, witnesseth:

"The party of the first part agrees to transfer to the party of the second part one undivided half interest of his (party of the first part) interest in claim No. 2 and 3, namely, Grouse and Snipe, on Elkhorn Creek District, Territory of Alaska, that is to say, one-fourth interest in said claim upon the following terms, towit:

"The party of the second part agrees to assume one-half the obligations entered into by the party of the first part with Mr. C. D. Campbell, for the purchase of the said property on Elkhorn Creek.

"The party of the second part also agrees, free of cost to first party, to erect a proper sluicing outfit on said above mentioned claims and to do the assessment work thereon this season.

"The party of the second part also agrees to do assessment work of claim No. (27) twenty-seven, Gold Bottom Creek, Eldorado District, and Claim one above Jones Creek, entering the Salmon Bonanza District, and should claim (27) twenty-seven, Gold Bottom Creek, have been forfeited by noncompliance with the law of last January, that is, should it have been filed on at that time legally, which should be ascertained by party of the second part from the records, in that event party of the second part shall do the assessment work on Claim No. One, above on Jones Creek, and Claim No. One, below on Boston Creek, emptying into Shovel, both in Bonanza District, Alaska, and as time is the essence of this contract party of the second part agrees to have the assessments finished by the middle of July, 1900."

It is alleged that appellant A. D. Coulter has performed all the terms and conditions of said contract on his part

Sept. 1902.] Opinion of the Court.—HADLEY, J.

to be performed, as far as the same relates to said claims on Elkhorn creek, and that he tendered performance as far as it relates to the claims on Jones creek and Boston creek, and was ready and willing to so perform, but was prevented from so doing by the acts of the respondent in that respondent procured others to do the assessment work upon said claims which said appellant was by said contract required to do; that said appellant, for himself and respondent, in connection with the owners of the other undivided half of said claims on Elkhorn creek, did a large amount of development work and mining on said claims over and above the amount required for assessment work thereon; that in doing said work and mining certain gold dust was extracted, and certain expenses were incurred in the extraction thereof; that the amount of one-half of the gold dust so extracted was 587 ounces, and one-half of the expenses incurred amounted to \$9,269.13; that said appellant has paid all of said expenses except the sum of \$1,255, which remains unpaid; that there now remains of said gold dust 109 ounces, of the value of \$1,744; that there is still due on the purchase price of the one-half interest in said claims the sum of \$800, and that said appellant has offered to settle with respondent, and to account for said sums, after deducting the said amount of purchase money and other unpaid expenses as aforesaid; that respondent refused, and still refuses, to settle with said appellant upon any terms, and denies said appellant's right to any part of said gold dust, and refuses to make conveyance to said appellant of any interest in said claims. The answer prays that the court may ascertain the true status of the accounts between respondent and appellant A. D. Coulter, and also for a decree compelling respondent to specifically perform said written contract by making a conveyance to said

appellant of an undivided one-fourth interest in and to said claims on Elkhorn creek. The reply generally denies the material averments of the answer except the averments that the gold dust extracted was taken from said Elkhorn creek claims, and also that respondent refuses to convey an undivided one-fourth interest in said claims to either of the appellants. The cause was tried by the court without a jury, and resulted in a judgment that respondent shall recover from appellants, and each of them, the sum of \$1,807.04 and costs, and also that the aforesaid written contract shall be canceled because of the failure of the appellant A. D. Coulter to comply with certain of the covenants on his part to be performed. From said judgment this appeal was taken.

It is assigned that the court erred in granting respondent's motion to strike certain paragraphs of the answer and cross-complaint. No reference is made to the subject-matter of those paragraphs in the foregoing statement of the issues, for the reason that they formed no part of the issues under which the cause was finally tried. The paragraphs stricken contain averments relating to certain alleged oral conversations and agreements between respondent and appellant A. D. Coulter prior to the time of the execution of the written agreement above quoted. Whatever those conversations or agreements may have been, it nevertheless follows, under the well-known rule that all previous agreements concerning the subject-matter of a written agreement are presumed to be merged in the written agreement, that such must be the case here. The written agreement is not only admitted by appellants but is first introduced into the record by them in their answer. To that agreement alone we must refer in order to determine the status of the parties with relation to the subject matter of the contract. The paragraphs were

Sept. 1902.] Opinion of the Court.—HADLEY, J.

stricken on the ground that they contained redundant and immaterial matter. We think the view of the trial court was right, and that no error was committed in that particular.

It is assigned that the court erred in finding that respondent was the owner of an undivided half interest in the claims on Elkhorn creek, it being contended by appellants that Campbell, the grantor of respondent's interest in the claims, owned no more than a one-fourth interest therein when he conveyed to respondent. It is claimed that one Mrs. Reynolds was the owner of a one-fourth interest which was not conveyed. It appears from certain evidence that this Mrs. Reynolds was known as the wife of Campbell, and seems to have been called by both the names of Campbell and Reynolds. It is admitted in appellants' brief that appellant A. D. Coulter stated that Campbell did own a half interest, and it is also admitted that it was so alleged in the answer; but it is urged that such is not the fact, and that appellants should not be bound by those admissions. The witness Gardner testified that he bought a half interest in the claims, and that Campbell bought the other half, the transfer being made to the two by one instrument. Gardner says he had a side partner, one Dailey, but that the transfer of the half interest was made to him alone, and the other half to Campbell. Both respondent and the witness Steele testified that appellant A. D. Coulter admitted in their presence that the gold dust which appellants had received and which came from said claims, was the property of respondent; and the witness Gardner testified to a similar admission made by the appellants in Alaska; and appellant A. D. Coulter admitted on the witness stand that in a conversation with respondent in the presence of the witness Steele he had agreed to pay over to respondent

the gold dust which appellants had. In opposition to the above the appellant A. D. Coulter testified concerning an alleged conversation he says he had with respondent upon his return from Alaska, in which he says he stated to the respondent that he discovered from the records at Council City, Alaska, that the title to one-half of the property did not stand in Campbell. This conversation respondent denies. Said appellant also stated in his testimony, over objection, aside from his detailment of said alleged conversation, that he found from the records in Alaska that Campbell did not hold title to one-half of the claims. There was no record or documentary evidence introduced to show that any portion of the half interest was vested in any other person than Campbell at the time of the transfer to respondent. Under these circumstances we will not disturb the court's finding that respondent was the owner of an undivided half of the Elkhorn creek claims at the date of making the written contract above mentioned.

It is next assigned that the court erred in finding that appellant A. D. Coulter failed to perform the obligations of said written agreement between himself and respondent, in that he did not do the assessment work required by the last paragraph of the contract to be done upon the Jones creek and Boston creek claims, and also that respondent did not prevent him from so doing. It is admitted that said assessment work was not done by said appellant, but he urges the excuse that respondent prevented him from doing it by procuring others to do it. The contract provided that said work should be done by the middle of July, 1900. Respondent employed other persons to proceed to Alaska and do the assessment work upon a large number of other claims in which he was interested, with instructions that, if said appellant had

Sept. 1902.] Opinion of the Court.—HADLEY, J.

not done the work upon the Jones and Boston creek claims by the 1st of August, 1900, then they were to do it. These parties went upon the latter mentioned claims and did some work before the middle of July, but did not leave them until after the middle of said month. Meantime said appellant had done no work upon the claims. He says he employed a party to proceed to the claims, and do the work within the contract time, and that such party found the work had been done, and left without doing anything. One of respondent's employees, who did some work upon the claims, testified that the work done was more in the nature of prospecting than of assessment work, and that the amount done in any event was not sufficient to cover the necessary assessment work. Under any view of the evidence said appellant Coulter was not prevented from going upon the claims and doing the amount of work required by his contract, and, since he failed to do any work whatever, we think the finding of the court was correct.

It is assigned that the court erred in refusing to find that appellant A. D. Coulter, immediately after the execution of said contract, left for Alaska to perform the terms thereof, and that respondent then said to him that he hoped he would mine and take out of said Elkhorn creek claims at least \$100,000 during the season of 1900. Respondent denies that he made any such statement, and we are not in position to say that the court erred in refusing to make the finding, since the only testimony upon that subject was that of appellant A. D. Coulter and respondent. The court heard these men testify and is better able to determine the weight to be attached to their testimony than is this court, with only the record before it.

It is also urged that the court should have found that

appellant Charles Coulter received no part of the gold dust, and also that appellant A. D. Coulter incurred an expense necessary for the extraction of the gold dust, amounting to \$1,626, and further, that the court erred in not permitting appellants to prove expenditures in said amount. The testimony shows that mining was done on the Elkhorn creek claims during that season by men who took what were called "lays," they agreeing to pay the owners of the claims a royalty of twenty-five per cent. of the gross amount of gold taken from the claims. The testimony of appellant Charles Coulter showed that appellants received \$1,862.04 as one-half the total amount of such royalty, the other half having been received by the witness Gardner, who represented a one-half interest in the claims. The amount received by appellants represented the royalty belonging to respondent's half interest in the property. We think it sufficiently clear that both appellants received this royalty, as they were acting together. They together kept books of account concerning it. There was some testimony to the effect that they received more than the amount stated, but the court accepted the amounts disclosed by the books, from which appellant Charles Coulter was permitted to refresh his memory for the purpose of testifying. The court allowed them the expenses incurred for the purpose of evicting certain jumpers from the claims. They, however, claim they should have been allowed the aforesaid sum of \$1,626 as expenses incurred in mining. Appellants worked upon the claims under the lay arrangement known as the "McNeil lay." They had one other man working with them as one of their party. The seventy-five per cent. taken under the McNeil lay was divided between appellants' party and the McNeil party. Appellants sought to prove that they were put to an expense of \$1,626 in

Sept. 1902.] Opinion of the Court.—HADLEY, J.

mining said gold, which in part consisted of wages for themselves and their associate, and further sought to offset this expense against the royalty which they received from other miners. The contract with respondent gave appellants no authority to incur expenses in mining these claims. The contract, as far as these claims were concerned, simply required A. D. Coulter to build a sluicing outfit and do the assessment work upon the claims. But all that was to be done as a part of the purchase price for a half of respondent's interest. Since they were not authorized to mine the claims, they did the mining without authorization or employment. They assumed to work under a lay, as other miners worked. Other miners assumed all risk of expenses of mining, taking for themselves seventy-five per cent. of the gross output extracted by them, and yielding absolutely to the owners the remaining twenty-five per cent. The owners were chargeable with no expenses attached to the mining. The court did not, as we understand it, however, hold appellants for the gold extracted by themselves, on the theory, no doubt, that there was evidence tending to show that the expense of extracting it exceeded the amount taken out. They were held only for the amount of royalty received from other miners. We think the court did not err in the particulars last discussed.

We have discussed somewhat at length the evidence under the various assignments as to the court's findings and as to its refusal to make findings, in order that it may be seen how the record here appears, as we understand it. There is conflicting testimony, but we think there is no such preponderance of evidence against the findings as would authorize this court to interfere with them. The error assigned upon the conclusion of law that respondent is entitled to recover the amount of the judgment

has already been sufficiently discussed, since the conclusion follows from the facts found. But it is further assigned that the court erred in the following conclusion of law, and in entering judgment accordingly, towit:

"That the defendant A. D. Coulter is not entitled to a decree as prayed, for a specific performance of said written contract; and is not entitled to a conveyance from the plaintiff of any interest whatsoever in or to the mining claims hereinbefore described; but said written contract, on account of failure of the performance thereof on the part of the said A. D. Coulter is, and should be held to be, at an end and canceled."

We find no error in the above. One of the conditions of the written contract was that the assessment work should be done upon the Jones and Boston creek claims by the middle of July, 1900. The work was not done within the time, or at all. It therefore follows that said appellant is not entitled to a specific performance of the contract by a conveyance to him.

But it is further urged that, since respondent did not, in his pleadings, ask for relief by way of cancellation of the contract, it was error on the part of the court to cancel the same. If said appellant is not entitled to specific performance of the contract, then it would appear that he has no further rights thereunder, since time was made of the essence of the contract. Therefore, under the well known rule that, when the jurisdiction of a court of equity attaches for any purpose, it extends to the whole controversy, we think it was competent for the court to declare the contract at an end. 1 Beach on Modern Equity Jurisprudence, § 21; Bispham, Principles of Equity (6th ed.), § 37.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON, DUNBAR, WHITE, ANDERS and MOUNT, JJ., concur.

Sept. 1902.]

Opinion Per Curiam.

[No. 4878. Decided September 30, 1902.]

FIRST NATIONAL BANK OF SEATTLE, Respondent, v. GOR-
DON HARDWARE COMPANY, Defendant, JAMES C. SPURE
et al., Appellants.

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31 683]

APPEAL — NOTICE — PARTIES.

When a party to an action has not appeared except for the purpose of disclaiming any interest in the subject matter of the suit, he is not a necessary party to the suit, and need not be served with notice thereof.

SAME — DISMISSAL FOR FAILURE TO SERVE ALL PARTIES.

A motion to dismiss an appeal for want of service of notice upon one of the parties to the action is premature, where the appellant has not brought up his record on appeal and his time therefor has not expired, since the question of whether due notice of appeal has been given to all the parties entitled thereto can be determined only by an inspection of the record.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Dismissal of appeal denied.

Byers & Byers, for appellants.

I. D. McCutcheon, for respondent.

PER CURIAM.—The respondent, plaintiff below, on May 12, 1902, obtained a judgment against the defendant and appellants foreclosing a mortgage upon real property. On August 9, 1902, the appellants gave notice of appeal from the judgment, serving the same upon the plaintiff in the action only, omitting to serve the defendant Gordon Hardware Company. The respondent moves to dismiss the appeal on this ground, bringing here a short record showing the judgment, the notice of appeal, and the return of service thereon, and the bond on appeal. The record of the appellants is not in this court, and the time fixed by statute in which it must be filed has not expired. The appellee

lants oppose the motion to dismiss, contending that the whole record will show that the answer of the Gordon Hardware Company was in effect a disclaimer of interest; that it afterwards defaulted, and that it had no such interest in the subject-matter of the action as to require a service of the notice of appeal upon it. In the case of *In re Murphy's Estate*, 26 Wash. 222 (66 Pac. 424), we held that the statute authorizes a resort to the record to determine whether due notice of appeal has been given to all the parties entitled to notice; and in *Watson v. Sawyer*, 12 Wash. 35 (40 Pac. 413), we held that, when a party to an action has not appeared except for the purpose of disclaiming any interest in the subject-matter of the suit, he is not a necessary party to the appeal, and need not be served with notice thereof. It is apparent, therefore, that, if the respondent's contention be correct, the appeal ought not to be dismissed. It is said, however, that the appellants ought not to be permitted to show these matters by affidavit, or statements made at the hearing, but that they should have brought the record here, so that the court could determine for itself, from an inspection of the record, whether or not the motion is well taken. But the statute gives the appellants a certain time within which to file their record in this court, and we do not think the respondent can be permitted to shorten this time by moving to dismiss the appeal. We conclude, therefore, that the motion is premature under the showing made, and that it must be denied, without prejudice to the right to renew it when the appellants' record is filed in this court, and it is so ordered.

Sept. 1902.] Opinion of the Court.—HADLEY, J.

[No. 4181. Decided October 1, 1902.]

W. W. ROBINSON, Appellant, v. A. THOMA, Respondent.

SALES — EXECUTORY AGREEMENT.

Payment of purchase money to bind a bargain of sale constitutes merely an executory contract, which does not ripen into a valid sale until the payment of the balance on or before the time stipulated in the contract.

SAME — ACTION TO RECOVER GOODS — ABSENCE OF DEMAND AND TENDER.

A directed verdict in defendant's favor was warranted in an action to recover a quantity of hay under a contract which recited: "Received from W. W. Robinson ten dollars, on acct. of 100 tons hay, more or less, at \$5.50. Hay to be moved by the last of July," where the evidence showed that the price was not tendered nor demand for the hay made until a week later than the stipulated time.

TENDER OF PRICE — DEPOSIT OF MONEY IN BANK.

The deposit of a sum of money in bank to the credit of the adverse party, and notifying him thereof, does not constitute a sufficient tender in law.

Appeal from Superior Court, Skagit County.—Hon. GEORGE A. JOINER, Judge. Affirmed.

Shrauger & Barker, for appellant.

Henry McLean, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This action was brought by appellant against respondent to recover a quantity of hay, or the value thereof. It is alleged that on the 20th of June, 1900, appellant purchased of respondent a quantity of hay, estimated by both of them to be 100 tons, and that the agreed price was \$5.50 per ton; that, in pursuance of the agreement then made, appellant paid respondent the sum of \$10, and respondent signed and delivered to appellant a writing, of which the following is a copy:

"Received from W. W. Robinson (\$10) ten dollars, on acct. of 100 tons hay, more or less, at \$5.50. Hay to be moved by the last of July. I agree to haul said hay to steamboat landing."

It is further alleged that respondent afterwards withheld possession of the hay, and refused to deliver it, or permit appellant to take it away; that appellant tendered to respondent the sum of \$540, being the balance due, which sum was placed by appellant in the First National Bank of Mount Vernon, Washington, to the credit of the respondent, of which respondent was duly notified; and that said amount has at all times been, and is now, subject to the order of respondent. The answer admits that appellant agreed to purchase the hay, but avers that he failed to carry out the terms of his agreement, and that the sale was never completed. It is admitted that respondent executed the writing set out in the complaint, and averred that appellant accepted it as the contract between them. It is admitted that a steamboat came to the landing, and that an attempt was made to load hay thereon, which respondent had stored in the warehouse of the landing, and that respondent refused to permit its removal; but it is averred that this occurred about the 7th or 8th of August, and not on or prior to the last of July. It is denied that respondent took the hay from the possession of the appellant, and is averred that respondent was at all times in possession thereof up to the time of the bringing of this suit. It is denied that any tender of any sum was ever made upon the purchase price of the hay. A trial was had before a jury, and at the conclusion of appellant's testimony respondent moved that the jury be instructed to return a verdict for respondent. The motion was granted, and the jury returned a verdict that respondent is entitled to the possession of the property, and assessed the value thereof at

Sept. 1902.] Opinion of the Court.—HADLEY, J.

\$550. Thereafter judgment was entered accordingly, and from said judgment this appeal is prosecuted.

There are several formal assignments of error, but appellant, in his brief, states that the whole controversy in the case centers in the interpretation that shall be given to the writing heretofore mentioned as having been signed by respondent and delivered to appellant. We will, therefore, confine ourselves to a discussion of that subject. It is suggested by appellant that in taking the cause from the jury and instructing a verdict for respondent, the court evidently considered the aforesaid writing as an executory contract, under which appellant was to purchase the hay, the purchase to be made before the last of July; and that the trial court further viewed the case as falling within this court's ruling in *Adams v. Ames*, 19 Wash. 425 (53 Pac. 546). It is urged that the decision in the aforesaid case is not in point here, and that the contract in the case at bar was that of an absolute sale, and was not an executory agreement. It is admitted that this court construed the contract set out in the former case to be an executory one, but it is insisted that such construction cannot be placed upon the language of the writing in the case at bar. The contract in *Adams v. Ames, supra*, was for the sale of a quantity of oats at a stated price, to be delivered to such steamboat, scow, or other common carrier as should be sent by the purchaser to a named warehouse, the purchaser agreeing to remove the oats within fifteen days. The paper was signed by the vendor, and delivered to the vendee, as was done in this case. After the expiration of fifteen days, a boat was sent, and delivery of the oats demanded, which was refused. The language of the contract in that case included the following:

“I have this day sold to J. Q. Adams & Co. 60 or 70 tons
of good merchantable white oats”

Thus, the vendor stated that he had actually *sold* the oats, but this court said:

" . . . we are satisfied that the contract was an executory one and the appellants' right to recover was subject to the performance of certain conditions precedent, viz., the payment for, and the removal of, the oats within fifteen days from the date of the contract."

In the case at bar the language of the writing does not seem to be as strong as in the former case. Respondent does not say he has *sold* the hay, but acknowledges receipt of \$10 "on acct. of 100 tons hay, more or less, at \$5.50." However, the evident intention of each contract was the same, viz., an agreement to sell certain property, which should be removed within a given time, and payment likewise made. There is in this case the additional element of an agreement on respondent's part to haul the hay to the steamboat landing. But the evidence does not show any demand for the hay to be so delivered, accompanied by tender of payment prior to the last of July, the time fixed by the contract. There was never any actual tender. Appellant says he deposited the amount in a bank at Mount Vernon to the credit of respondent, but it cannot be urged that that was a tender in law. Even the deposit was not made until in the early days of August, after the demand was made for the delivery of the hay, and all of which was later than the last of July, as provided in the contract. We see no essential difference in principle under the facts of this case between it and *Adams v. Ames, supra*. In that case a motion for nonsuit was granted, and the judgment was affirmed. That decision was based upon elementary principles. Certain conditions precedent remained to be performed before right of possession accrued. It was necessary that the price be paid and the goods removed within a given time. There does not appear to have been

Sept. 1902.] Opinion of the Court.—HADLEY, J.

any earnest money paid in that case as in this; at least, no amount is disclosed, the blank being left unfilled. That difference, however, is immaterial. This principle is stated in an elementary way as follows by a distinguished text writer:

“The vendee cannot take the goods, notwithstanding earnest be given, without payment. Earnest is only one mode of binding the bargain, and giving to the buyer a right to the goods upon payment; and if he does not come in a reasonable time after request, and pay for and take the goods, the contract is dissolved, and the vendor is at liberty to sell the goods to another person. If anything remains to be done, as between the seller and the buyer, before the goods are to be delivered, a present right of property does not attach in the buyer.” 2 Kents’ Commentaries (14th ed.), p. *495.

Thus the right of possession did not accrue to appellant here. He did not pay or tender payment within the time he was to remove the hay by the contract. He made no demand and caused no boat or other means of conveyance to call at the landing for the hay within the time, and made no demand that the balance of it be placed upon the landing. Until these conditions precedent were performed, appellant was not entitled to possession, and, in the absence of their performance, respondent had the right to stand upon the time provision in the contract, and refuse to deliver possession. We therefore think, under the facts as shown by appellant’s testimony, that there was no question for the consideration of the jury, and that the action of the court was right.

The judgment is affirmed.

REAVIS, C.J., and DUNBAR, MOUNT, FULLERTON, ANDERS and WHITE, JJ., concur.

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[No. 4294. Decided October 1, 1902.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK STENTZ, *Appellant*.

CRIMINAL LAW — COMPETENCY OF JUROR — KNOWLEDGE OF MATERIAL FACTS — CHALLENGEABLE FOR BIAS.

Where one whose name had been indorsed on an information as a witness for the state is drawn as a juror, he is incompetent to serve on the ground of bias, even though he disclaims any, when he has knowledge of material controverted facts in the case; and the action of the court in forcing the defendant to exhaust his last peremptory challenge against such juror is reversible error.

SAME — DUTY OF PROSECUTING ATTORNEY TO INFORM COURT.

Where the prosecuting attorney who has inquired into the facts connected with an accusation of crime, and indorsed the names of witnesses upon an information laid by him, knows that a person called as a juror is a material witness to controverted facts constituting the offense, it is his duty to so inform the court, to the end that he may assist the administration of justice in upholding the constitutional guaranty of trial by an impartial jury.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Reversed.

Sullivan, Nuzum & Nuzum, for appellant.

Horace Kimball, Prosecuting Attorney, and *Miles Pindexter*, for the State.

The opinion of the court was delivered by

WHITE, J.—The information in this case was filed by the prosecuting attorney of Spokane county on November 5, 1901, charging the appellant with the crime of manslaughter. The information, omitting formal parts, is as follows:

“That the said defendant, Frank Stentz, in the county of Spokane, and state of Washington, on the 16th day of October, 1901, did unlawfully, feloniously, wantonly, neg-

Oct. 1902.] Opinion of the Court.—WHITE, J.

ligently, recklessly and wilfully drive a team of two horses, the said horses then and there being hitched to a wagon upon a certain road, the same then and there being a public highway, in a manner likely to endanger the persons and lives of others, and so did then and there in the commission of said unlawful act unlawfully and feloniously run and drive the said horses and wagon on, over and upon M. W. Orton, and so did then and thereby, as aforesaid, unlawfully and feloniously inflict upon the said M. W. Orton certain mortal injuries, by and on account of which injuries the said M. W. Orton then and there died, and so the said Frank Stentz did then and there, in the manner aforesaid, involuntarily, but in the commission of the unlawful act aforesaid, unlawfully and feloniously slay and kill the said M. W. Orton."

On the information, the name of R. M. Sperry, among others, was indorsed as a witness for the state. While impaneling the jury in the cause, said R. M. Sperry was drawn as a juror, and, upon being questioned as to his competency, testified in substance that he knew the defendant by sight, and that he had no opinion as to the defendant's guilt or innocence. This question was then asked him by the prosecuting attorney: "I ask you to state whether or not from any cause, whether I have mentioned it or not, you would be hindered or impeded in giving a fair and impartial trial to the defendant." He answered: "The only cause is that I am liable to be a witness in the case. For that reason, I guess I would not be eligible to sit on the jury." He further testified that that fact would not prejudice or bias him for or against the defendant, and that he felt satisfied he could give the defendant a fair and impartial trial. On cross-examination, he said he had not been subpoenaed as a witness, but he "distrusted that there was a subpoena issued for him which had not yet been served;" that "some of the prosecuting attorneys had talked with him with refer-

ence to something in the case." The following appears from the record:

"Mr. Nuzum (for defendant): I submit, your Honor, that this juror's name appears as a witness in this information—indorsed on the information, and although the subpoena has not been served on him, his name appears here as one of the witnesses for the state, and we submit a challenge for cause.

"Mr. Poindexter (prosecuting attorney): I don't know anything that would exclude him on that ground; he states positively he formed no opinion as to the guilt or innocence of the defendant.

"The court: I think a juror may be called as a witness in a case; but I don't think that the court, in the exercise of sound discretion, would permit a party who is likely to be called as a witness, if he is advised of that fact beforehand, to sit on a jury. The answer that this juror makes to the question would not disqualify him as a juror. If you are able to state at this time, Mr. Poindexter, that you will not call him as a witness in the case, I think the challenge ought to be denied; if he is going to be a witness in the case, I think the objection ought to be sustained.

"Mr. Poindexter: I will say I will not call him as a witness, if he is chosen as a juror.

"Mr. Nuzum: On that statement alone I think our challenge ought to be sustained. There is something he wants to prove by him if he don't sit, but he is willing to have him sit as a juror without testifying. I don't think that comes within the provision of the law that we are entitled to a fair and impartial trial, as in a case of this kind we are entitled.

"The court: As I have already stated, I don't think the juror's answers are sufficient to disqualify him. The only ground upon which I could sustain a challenge in this case is that the juror might be called as a witness. I don't think the court ought to permit a juror to sit if the court is advised that he is going to be called as a witness.

"Mr. Sullivan: I think when the prosecutor says if

Oct. 1902.] Opinion of the Court.—WHITE, J.

he is called on the jury he will not call him as a witness, I think that ought to disqualify the juror; they have talked to him, we haven't.

"The court: The challenge is denied.

"Defendant excepts. Exception allowed."

The impaneling of the jury in the case then proceeded, the appellant having exercised his fifth peremptory challenge by excusing O. W. Piper, one of the jurymen. Thereupon one J. E. Gibbs was drawn as a juror, and, upon being questioned as to his competency and qualifications, by the counsel for the state, testified in substance: That he had formed an opinion from reading newspaper articles; that he had no fixed opinion; that he could disregard it; that he still had the opinion so formed; that it would require some evidence to remove it; that what he had read would have no weight, or affect him in any way upon the trial. This juror was challenged by the appellant, and the challenge denied. The appellant thereupon excused the juror Sperry, thereby exercising his sixth and last peremptory challenge. The impaneling of the jury was then completed. The jury, after a trial, returned a verdict of guilty. On this verdict, judgment was entered.

The evidence in this case, exclusive of the testimony of the juror Sperry, tended to show that there were four men in a wagon drawn by a bay and a gray horse; that this wagon ran over the deceased, who was on a bicycle, thereby causing his death; that the team was running towards Cheney, and on the public road; that the driver was holding the lines tightly. The deputy sheriff testified that he had a talk with the accused after his arrest. The appellant told the deputy sheriff that the horses were running away; that when he went to turn to the right, in order to pass the man on the bicycle, the man turned the same way, and he tried to turn the other way, but the

team got beyond his control, striking the man's bicycle; that he did not know until after he was arrested that he had run over and killed the man. There was evidence tending to show that, after the team ran over the deceased the persons in the wagon attempted to avoid others, and went on an unfrequented road. There was evidence tending to show that the appellant and the three others in the wagon were out on a hunting expedition; that they had two kegs of beer, and had been drinking beer before the commission of the offense charged, and that there was also a small demijohn of whiskey in their possession. The killing of Orton took place very near the junction of the Mullinix and Lance Hill roads, about a mile and a half or two miles from Cheney. The place where the juror Sperry met the men in the wagon was about two miles southwest of this point. Mr. Sperry was called by the state as a witness, and testified:

"That a team, one horse light and the other dark, hitched to a wagon with four men in it, passed him on the public road about eight o'clock on the morning of the commission of the offense; that the men in the wagon were acting rather jolly; that they hallooed and yelled at him; that their actions were as if they were in pretty good spirits; that they motioned their hands to him, and hallooed something, but he could not distinguish what they said; that they were driving pretty fast,—unusually fast; that the fact that they were driving so fast attracted his attention; that he did not consider the team was running away; that they were going towards Cheney." "Q. Did they increase the speed while you saw them? A. Yes. They increased the speed some. Q. What did they do with reference to that? A. Well, when I met them they were hallooing, and I did not recognize who they were, and I presumed it was somebody that knew me, and I threw up my hand and said, 'Halloo.' This is when they went by. And the fellow that was driving he kind o' came up this way (indi-

Oct. 1902.] Opinion of the Court.—WHITE, J.

cating) with the lines and gave a kind of whoop as though they were having a good time, and then they went a little faster."

He further identified the appellant as the man who was driving. The first error assigned is the denial of the challenge for cause by the court to the juror Sperry. The constitution of the state provides that an accused person shall be tried by an impartial jury, and that offenses heretofore required to be prosecuted by indictment may be prosecuted by information, as shall be prescribed by law. It is the duty of the prosecuting attorney, whenever a public offense has been committed, and the party charged is not under indictment for the offense, and the court is in session, and the grand jury is not in session, to prosecute the offender by information. § 6802, Bal. Code. In order to file such information, it is the duty of the prosecuting attorney to inquire into and make full examination of all the facts and circumstances touching the commission of the offense. The names of the witnesses known to the prosecuting attorney at the time of filing the information must be indorsed thereon. § 6832, Bal. Code. The name of the juror Sperry was indorsed on the information against the appellant, at the time the information was filed. From that fact, the law presumes that the prosecuting attorney knew the facts that such witness would testify to. Under the law, when the grand jury is not in session the prosecuting attorney performs the duties appertaining to the grand jury. He inquires into the commission of the offense. He performs a most important duty. As such officer, he is the sworn minister of justice, whose duty it is to see that the innocent are protected, as well as that the guilty are brought to punishment. It is as much his duty as it is that of the court, to see to it that no one is convicted of a crime excepting in the manner

provided by law. If he knows that an impartial jury is not being selected when the accused is brought to trial, it is his duty, as a representative of the state, to make that fact known to the court, so that constitutional and legal requirements may be adhered to. The state is just as much interested in preserving constitutional requirements in the trial of an accused person as in prosecuting the infraction of the laws. As was said by Chief Justice CHRISTIANCY, in *Hurd v. People*, 25 Mich. 406:

"The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community."

Here, the prosecuting attorney knew that the testimony that this juror would give went to the very gist of the offense. The testimony of Mr. Sperry was a step towards the conviction of the appellant, and had a direct bearing on the guilt of the accused. Mr. Sperry was not called upon to testify as to independent facts necessary to be proven,—for instance, that the place where the offense occurred was in the county in which the venue was laid, or that he knew the person alleged to have been killed, in his life time, and that he knew he was dead, or as to the character of the accused as a peaceable and law-abiding citizen, or as to the character of a witness for truthfulness. While such facts are necessary to be shown, or may be shown, they are just as consistent with the guilt of any other person as with the guilt of the accused, and their establishment does not go towards the conviction of the accused person.

Oct. 1902.] Opinion of the Court.—WHITE, J.

of the crime charged against him. A witness called upon to testify to such facts might not be incompetent as a juror, but a witness who knows about the controverted facts in the case,—the *res gestae*, as we might say,—such as the reckless driving of the accused on the public highway immediately preceding the commission of the offense, a short distance from where the offense was committed, it seems to us knew material, controverted facts that would of necessity bias and influence his judgment as a juror. To permit such a person to sit upon the jury was to deprive the accused of a trial by an impartial jury. It is true that we have a statute that declares:

“A juror may be examined by either party as a witness, if he be otherwise competent. If he be not so examined, he shall not communicate any private knowledge or information that he may have of the matter in controversy to his fellow jurors, nor be governed by the same in giving his verdict.” § 5001, Bal. Code.

This section must be construed in connection with the constitutional guaranty to an accused person of an impartial trial, and the statutes relative to challenging jurors. The law, by simply declaring that a juror shall not be governed by any knowledge that he may have of the facts, does not obviate the bias that may really exist in the mind of the juror. A juror may be challenged for actual bias. § 4988, Bal. Code. Actual bias is defined as “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the trier, in the exercise of a sound discretion, that he [the juror] cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” § 4983, Bal. Code. Can it be said that, if the court had known of the knowledge of this juror of the controverted facts in the case, it would have allowed him to act as a

juror? We think not. If the court had known the facts as to the knowledge of the juror, and had not sustained a challenge for actual bias, we think it would have been an abuse of sound discretion. A jury has been defined as a body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them. 17 Am. & Eng. Enc. Law (2d ed.) 1095. Our Code (Bal. Code, § 4730) defines it as "a body of men temporarily selected from the qualified inhabitants of a particular district and invested with power (1) to present or indict a person for a public offense; (2) to try a question of fact." Under the constitutional provisions defining the rights of accused persons, the appellant had the right, not only to be tried by an impartial jury, but to defend in person and by counsel, and to meet the witnesses against him face to face. Art. 1, § 22, constitution. This means that the examination of such a witness shall be in open court, in the presence of the accused, with the right of the accused to cross-examine such witness as to facts testified to by him,—not that the witness may carry into the jury room, in the recesses of his own mind, knowledge of material, controverted facts which of necessity must bias his judgment. Further, in a criminal prosecution the verdict must be the unanimous verdict of twelve impartial men, not the verdict of eleven impartial men or any less number than twelve. It is a violation of the defendant's constitutional rights to deny his challenge to a juror who has formed, from newspaper accounts, an opinion as to the defendant's guilt, where it would take strong evidence to change such opinion, even though the juror says he could lay aside his opinion, and try the case wholly upon the evidence, as if he had heard nothing about it. *State v. Murphy*, 9 Wash. 204 (37 Pac. 420). It needs no argument to show that it would require strong evidence

Oct. 1902.] Opinion of the Court.—WHITE, J.

to remove from the juror Sperry's mind the fact that the accused was driving recklessly along the highway just preceding the commission of the offense, and that this was an important fact as to his guilt. The juror Sperry seemed to realize this fact himself, judging from his answers. If all the jurors who tried the cause had been personally cognizant of the same facts as the juror Sperry conviction would inevitably have followed, and, as was said in the case of *State v. Murphy, supra*, "the trial would have been little less than a farce, and our boasted constitutional privilege of a trial by an impartial jury would be a privilege existing more in theory than practice." The discretion of the trial court to determine partiality or impartiality in a jury is subject to review by the appellate court under the constitutional guaranty to the accused of a trial by an impartial jury. *State v. Rutten*, 13 Wash. 203 (43 Pac. 30).

A refusal to sustain challenges for proper cause, necessitating peremptory challenges on the part of the accused, will be considered on appeal as prejudicial where the accused has been compelled subsequently to exhaust all his peremptory challenges before the final selection of the jury. *State v. Rutten, supra*. An examination of this record discloses that it is a very close question whether the juror Gibbs was a qualified juror under the rule laid down in *State v. Murphy, supra*, but, conceding that he was, he had formed an opinion that it would require some evidence to remove; and the accused, in exercising his last peremptory challenge, had to choose between this juror and the juror Sperry. But for the presence of the juror Sperry in the box, it is fair to presume that the last peremptory challenge would have been exercised in excusing the juror Gibbs. As is said by the supreme court of Pennsylvania, in *Commonwealth v. Joliffe*, 7 Watts, 585, "that a witness

is supposed to stand as a partisan is shown by more than one passage in the law." And further, that "the presumption in the case of a witness, therefore, is against impartiality." The juror Sperry's name was indorsed as a witness for the state on the information. The presumption was against his impartiality. This of itself should have induced caution in the court in denying the challenge. Under our practice, a juror who is examined on his *voir dire* is not permitted to disclose the facts within his knowledge. But here the prosecuting attorney knew that the juror was a material witness to controverted facts constituting the offense. Under such circumstances, it was his duty to have declared that fact to the court, or to have joined in the challenge. The supreme court of Arkansas, in *Hardin v. State*, 66 Ark. 53 (48 S. W. 904), in commenting upon *Vance v. State*, 56 Ark. 402 (19 S. W. 1066), says:

" . . . When it is apparent that the juror has formed an opinion from his own knowledge of the facts of the case, or that, from his connection with the prosecution or defense, he is not an impartial juror, his statement that he can give the defendant a fair and impartial trial will not remove the objection to his competency, for it is possible that the most prejudiced man might be willing to say, and even believe, that he would be an impartial juror. Had this juror answered that it would take no evidence to remove his opinion, he would have still been incompetent; and, even had he disclaimed any opinion, it is doubtful if he would have been a competent juror."

It has been held that one summoned as a witness in a criminal case is not competent to serve as a juror. *Atkins v. State*, 60 Ala. 45; *Commander v. State*, 60 Ala. 1; *Baldwin v. State*, 111 Ala. 11 (20 South. 528). It has been held that a juror who is voluntarily attending court for the purpose of testifying as to the good character of the accused is not qualified to sit as a juror; the court saying:

Oct. 1902.] Opinion of the Court.—WHITE, J.

"The danger of bias is not removed by showing that the witness has no knowledge of the more material facts bearing upon the issue, and expects to testify only as to the character of a defendant charged with a felony." *State v. Barber*, 113 N. C. 711 (18 S. E. 515).

There are cases, however, to the contrary: *White v. State*, 73 Miss. 50 (19 South. 97); *Fellows's Case*, 5 Greenl. 333. The jurors in the last two cases were not called to testify as to the material facts in the case. In the Mississippi case and in the Maine case they were witnesses as to character only. The question of bias was not raised in these cases. There is a dearth of authority on the direct point whether or not a person who has been subpoenaed, or whose name is indorsed on the information as a witness, or who is in attendance as a witness, is competent to sit as a juror in the trial of a case. The case nearest in point is that of *State v. Martin*, 28 Mo. 530. Martin was indicted for stealing cattle. The juror, on his *voir dire*, stated that he knew the cattle alleged to have been stolen; that his brother had once owned them and had sold them to a man named Kerr, who had subsequently sold them to the person alleged in the indictment to be the owner. The Missouri supreme court sustained the lower court in holding that the juror was competent on the express ground that the ownership of the cattle was not a controverted fact. The statute of Missouri provided that it should be a good cause for a challenge to a juror that he had formed an opinion upon the issues or any material fact to be tried. The court said:

"No question has heretofore arisen upon the construction of this provision of our criminal practice act; nor have we observed any case in any other state, where similar statutes have been passed upon by their courts. Ordinarily, there cannot be much practical difficulty in enforcing what seems to be the spirit and object of the provision, which is to secure impartial juries; and when questions of doubtful character arise, the courts of criminal jurisdiction—as a

matter of convenience and precaution, and with a view to avoid the possibility of subjecting the state to unnecessary cost, as well as to secure to the accused every reasonable satisfaction in selecting his triers—would usually set aside persons of questionable competency, when a bystander could be called in without delay, who would be unexceptionable to all parties. It is probably because of this practice on the circuits—and a very commendable one, too—that no cases of this sort have ever come up to this court.

. . . It is material to the prosecution to establish that the crime alleged was committed at a place within the county, for this is essential to the jurisdiction of the court. Does the knowledge that the alleged locality of an offense is within the county named in the indictment disqualify a juror from sitting on the case? We see at once that this fact, material as it undoubtedly is to the success of the prosecution, has no connection whatever with the guilt or innocence of the party accused, and that it is a fact known probably to nine-tenths of the inhabitants of the county, and therefore in all probability will not be controverted on the trial. In an indictment for murder, the fact of the killing is an essential of crime; but would a man, who accidentally was present at the burial of the murdered person and saw his dead body, and knew him when alive, be excluded as an incompetent juror on the trial of a supposed manslayer? Such facts as we have referred to are material in one sense. They constitute the basis of the prosecution; but they are independent facts, having no bearing on the question to be tried of the guilt or innocence of the accused. They are just as consistent with the guilt of any other person as they would be with the guilt of the accused; and their establishment does not make a single step toward a conviction. If these facts are controverted facts, it may be that a person who has formed an opinion upon them ought to be excluded from sitting on the jury; but where they have no bearing on the guilt of the accused and are likewise not controverted on the trial, it is plain that the juror is, in every material respect, impartial and competent."

When the facts, however, are material to a conviction, as

Oct. 1902.]

Syllabus.

in this case proof of wantonly, negligently, recklessly, and wilfully driving a team over the public roads, thereby causing the death of a person, we think the knowledge of such driving immediately preceding the commission of the offense was material, and a juror possessing the same cannot be said to go into a jury box in that state of mind in which the law contemplates a juror shall be when called upon to try one accused of a crime. Such a juror cannot be said to be an impartial one, notwithstanding he says he is.

We have alluded to the possible incompetency of juror Gibbs. We do not mean, however, to pass upon that question, or upon any of the other errors assigned. In all probability they will not occur on the next trial.

Inasmuch as the appellant was compelled to get rid of the juror Sperry by a peremptory challenge, the accused was deprived of one peremptory challenge to which he was by law entitled. For that reason, the judgment of the court is reversed, and the cause remanded for a new trial.

REAVIS, C. J., and HADLEY, FULLERTON, MOUNT, ANDREWS and DUNBAR, JJ., concur.

[No. 4296. Decided October 1, 1902.][30 147
31 440]

VICTOR ANDERSON *et ux.*, *Appellants*, v. WALLACE LUMBER AND MANUFACTURING COMPANY, *Respondent*.

CONTRACT FOR SALE OF LAND — FORM.

A contract for the conveyance of land, in order to be enforceable in equity, need not be executed and acknowledged with all the solemnity of a conveyance, inasmuch as agreements to convey do not come within the terms of Cal. Code, §§ 4517, 4518, which prescribe that all conveyances of real estate and all contracts creating or evidencing any incumbrance thereon shall be by deed, and that such deed shall be signed and acknowledged.

SAME — MUTUALITY OF AGREEMENT — SIGNATURE OF VENDEE.

Where a contract for the conveyance of land, though purporting to be a mutual agreement, was signed by the vendor only, but had been drawn up on the letter head of the vendee by its secretary, who wrote the vendee's name in the body of the instrument, and gave the vendor a letter to the president of the vendee company, signed by the secretary, requesting the payment of the balance of the purchase price to the vendor in fulfillment of the contract, the memorandum of sale must be held as showing a binding obligation as to both parties.

CORPORATIONS — AUTHORITY OF OFFICERS.

When a corporation permits certain officers to manage its business, it is responsible for their acts, even in the absence of the action of the board of trustees, unless it is affirmatively shown that their acts were unauthorized.

SPECIFIC PERFORMANCE BY VENDOR — ENFORCEMENT OF PURCHASE PRICE.

Specific performance of a contract for the sale of land is enforceable against the vendee by suit in equity for enforcement of the purchase price by collection of the money from any of defendant's property, or by order of sale as upon execution.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Reversed.

George E. Wright, for appellants.

Ira Bronson, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Suit by the vendors against the vendee for specific performance of contract to purchase timber land. At the trial the plaintiffs introduced evidence, documentary and oral, tending to prove the following facts: That plaintiffs were at the times mentioned husband and wife; that defendant is a domestic corporation carrying on the business of manufacturing, buying and selling and dealing in all kinds of lumber and logging, operating mills, acquiring timber, and doing all business connected therewith; that there were four trustees who exercised the pow-

Oct. 1902. Opinion of the Court.—REAVIS, C. J.

ers of the corporation, the by-laws making no provision for a general manager; that A. H. Gould, the vice-president and a trustee, was superintendent of the mills and camps; that there were only four trustees, although five were provided for in the articles of incorporation; that these trustees were F. D. Black, president; A. H. Gould, vice-president; George G. Startup, secretary, and C. H. Black, treasurer; that Mr. Gould negotiated with plaintiffs for the purchase of the timber land described in the memorandum in writing hereafter set out; that after such negotiations the plaintiff, Victor Anderson, by direction of Gould, went to the office of the defendant, a contract to buy the land was made, and by direction of Gould the secretary wrote out the memorandum of sale which was signed by Anderson, the original retained by the defendant, and a copy thereof written out by the secretary given to Anderson, and the \$25 mentioned therein paid to Anderson; that a power of attorney, given by Clara Bell Anderson, the wife, was held by Victor Anderson, and he was duly authorized to convey the premises; that a letter to President Black was then given to Anderson, who thereupon presented it to the president, who assented to the transaction, had the deed to the premises drafted by his attorney at his office, and himself subscribed the deed as one of the witnesses; that said deed was executed by plaintiffs, and acknowledged, and then taken by plaintiffs, with direction from the president to return with the deed the following day, when the president would go with Anderson, and examine the records of title, and, if they were satisfactory, receive the deed, and pay the remainder of the purchase price; that the next day Anderson went to the office, and Mr. Gould, for the defendant, refused to receive the deed, or pay the remainder of the purchase price for the land; that all the trustees had knowledge of the contract, and approved the same. It

was admitted that the records showed clear title in the land in plaintiffs. The memorandum is in the following form: "F. D. Black, President. George G. Startup, Secretary. A. H. Gould, Vice-President. C. H. Black, Treasurer.

We own and log our timber.

Wallace Lumber and Manufacturing Co.

Manufacturers of

Lumber, Lath and Shingles..

Fine Grades of Cedar and Fir a Specialty.

Wallace, Wash., Sept. 17, 1900.

This is to certify that I have this day sold to the Wallace Lbr. & Mfg. Co. of Wallace, Wash., my claim, namely, the S. E. $\frac{1}{4}$ of Section 15, R. 8 East, Town. 28, and also to acknowledge the receipt of \$25.00 (Twenty-five dollars) in hand paid as part payment of purchase price, namely, \$3,000.00 (Three thousand dollars), and it is understood that balance to be paid in ten days from date, if records appear all right.

Victor Anderson."

The letter delivered to the president was in the following form:

"F. D. Black, President. George G. Startup, Secretary. A. H. Gould, Vice-President. C. H. Black, Treasurer.

We own and log our timber.

Manufacturers of

Lumber, Lath and Shingles..

Fine Grades of Cedar and Fir a Specialty.

Wallace, Wash., Sept. 25, 1900.

Mr. F. D. Black:

Mr. Victor Anderson comes to you to settle up. We promised to let him know last Saturday but did not make your connections. Will you kindly take the matter up with him and settle as per agreement—\$3,000.00, less \$25.00 advance payment for which we hold receipt. Hope to see you up this way soon. Yours truly,

G. G. Startup."

At the conclusion of plaintiff's case a motion to dismiss was sustained, and the court entered a decree in favor of defendant.

Oct. 1902. Opinion of the Court.—REAVIS, C. J.

Only three questions seem material in the determination of the points raised here.

1. Is the memorandum sufficient to establish an enforceable contract between the parties? It is maintained by counsel for respondent that such contract for the conveyance of real property, to be valid, must comply in its form with §§ 4517 and 4518, Bal. Code, which prescribe that all conveyances of real estate, and all contracts creating or evidencing any incumbrance thereon, shall be by deed, and that such deed shall be signed and acknowledged. It may be observed that these sections relate only to conveyances, and to contracts creating or evidencing incumbrances; they do not necessarily include agreements to convey. In *Langert v. Ross*, 1 Wash. 250 (24 Pac. 443), a contract in similar form, signed by the vendor, was held a valid agreement to convey real estate. Again in *Vail v. Tillman*, 2 Wash. 476 (27 Pac. 76), was a similar conclusion. In *Baker-Boyer National Bank v. Hughson*, 5 Wash. 100 (31 Pac. 432), the objection was made "that the contract for a deed for the real estate which was to be conveyed to the defendants, for the part payment was not acknowledged and was, therefore, void." The court said:

"Under the decisions of this court this objection is without force, as we have held in several cases that a contract for the conveyance of real estate was entirely valid without any acknowledgment," citing the two above-mentioned cases. In *Edson v. Knox*, 8 Wash. 642 (36 Pac. 698), it was held that a deed without acknowledgment could be maintained as a valid contract for a deed. In *Kleeb v. Bard*, 7 Wash. 41 (34 Pac. 138), the validity of a contract for sale of standing timber was challenged. The court there observed:

"As to the Perry tract, conceding that an executory contract to sell standing timber to be cut and removed by the purchaser is a contract for the sale of an interest in land,

and therefore within the statute of frauds (1 Warv., Vend., p. 175; *Owens v. Lewis*, 46 Ind. 488), still we are unable to see why the contract which respondent held from the Perrys did not meet this requirement. True, it was not a deed, but it is not necessary that a contract to sell land, as such, be a deed."

It may be concluded that the repeated consideration of this court of the two sections of Ballinger, *supra*, confines their effect to proper requisites for evidence of legal title and incumbrances, and does not change the requirement for agreements evidencing contracts enforceable in equity under the statute of frauds. It is objected that the defendant here is the party to be charged, and that the contract was not signed by defendant, or any one on its behalf. Assuming, for the present, that authority to sign was vested in the secretary, the signature seems to fall directly within the rule stated in *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644 (32 Pac. 737). There the memorandum was not signed by the defendant corporation, but the instrument was in the handwriting of the agent. The memorandum was as follows:

"This agreement, entered into this 20th day of August, 1890, by and between the Bellingham Bay Boom Company, of Fairhaven, Washington, party of the first part, and J. H. Moore and others, respectively, whose names are hereto subscribed, parties of the second part, witnesseth," etc.

And the court observed:

"It is a well established rule of law that a contract is signed within the meaning of the statute, whether the name of the party to be charged appears at the bottom, top, middle or side of the paper. *Drury v. Young*, 58 Md. 546; *Clason v. Bailey*, 14 Johns. 487; *Barry v. Coombe*, 1 Pet. 640; 1 Reed, *St. Frauds*, § 384."

But it is contended that it must be shown that the name of defendant appears in some appropriate way to have been

Oct. 1902. Opinion of the Court.—REAVIS, C. J.

put in intentionally, to authenticate the memorandum. Conceding this, it is shown here that the agent wrote the memorandum, and wrote the name of defendant as vendee in addition to, and below, the printed name of defendant; and these facts are aided by the letter to President Black, signed by the agent. There can be no reasonable doubt that the vendor was bound by the memorandum, which purported to be a mutual agreement. The suggestion that it is in effect an option given by plaintiffs to defendant is not substantial. It purports to be an express agreement to convey the timber land, was so accepted by the defendant, and was so construed by the parties thereto; and a deed was thereafter drafted in pursuance thereof, by direction of defendant's officers, and executed by plaintiff; but defendant refused to receive the same.

2. The authority of defendant's officers to make the agreement is challenged by defendant chiefly upon the ground that the trustees did not act as an official board, but as individuals only. It appears there were four trustees. Each had knowledge of, and three of them actively participated in, the transaction—the president, vice-president and superintendent, and the secretary. The principle stated in *Carrigan v. Port Crescent Improvement Co.*, 6 Wash. 590 (30 Pac. 148), is applicable here, and is approved, that is, when a corporation allows certain officers to manage its business, particularly, as here, such as president, vice-president, and superintendent, it must be responsible for their acts unless it affirmatively shows they were unauthorized. Upon the facts as they now appear, the agreement evidenced by the memorandum was authorized by defendant.

3. The only remaining question is as to plaintiffs' right to enforce the contract by specific performance. The rule seems to be well supported by authority, and founded in

sound principle, that equity will enforce such contracts as well against the vendee as the vendor. In *Hogan v. Kyle*, 7 Wash. 595 (35 Pac. 399, 38 Am. St. Rep. 910), this rule was approved, and it was said:

"In fact, the prevailing modern authority is that, in a case of this kind the vendor can either sue at law for damages or resort to equity for specific performance."

This right is based upon mutuality in the contract. Warvelle on Vendors thus states the principle:

"A suit in equity against the vendee to compel a specific execution of a contract of sale, while in effect an action for the purchase money, has nevertheless always been sustained as a part of the appropriate and acknowledged jurisdiction of such court, although the vendor has, in most cases, another remedy by an action at law upon the agreement." Warvelle, Vendors, p. 779, and cases cited.

See, also, Pomeroy, Contracts (2d ed.), p. 6. The performance on the part of the defendant here required is the payment of the purchase price, which may be enforced by collection of the money from any of defendant's property, or enforced by order of sale as upon execution.

The judgment is reversed, and the cause remanded for a new trial consistent with the foregoing expressions.

HADLEY, ANDERS, FULLERTON, WHITE and MOUNT, JJ., concur.

[No. 4885. Decided October 1, 1902.]

JOHN R. GRAY *et ux.*, Respondents, v. WASHINGTON WATER POWER COMPANY, Appellant.

APPEAL — UNCONSIDERED OBJECTIONS — REVIEW ON SUBSEQUENT APPEAL.

Where the supreme court, in reversing an order of the lower court granting defendant a new trial which had been

Oct. 1902.]

Opinion Per Curiam.

granted on an erroneous ground, refused to review other grounds upon which the lower court ruled against defendant, the defendant may, upon the entry of judgment denying its motion, appeal therefrom itself, and have a review of the grounds urged by it originally, which had not been sustained at the time its motion for a new trial was under consideration by the lower court.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Dismissal of appeal denied.

Stephens & Bunn and *W. F. Townsend*, for appellant.

W. H. Plummer and *Thayer & Belt*, for respondent.

PER CURIAM.—On the trial of this case in the court below, plaintiffs recovered a verdict. Thereupon the defendant filed a motion to vacate and set aside the verdict upon several grounds. These grounds were all denied except one, viz., that the running away of plaintiffs' horse was the proximate cause of the injury upon which the complaint was based. This one ground was sustained, and upon it alone the court set aside the verdict, and granted a new trial. From this order, plaintiffs appealed, and this court, on March 19, 1902, reversed the order granting a new trial, and directed the lower court to deny the motion. 27 Wash. 713 (68 Pac. 360.). Thereafter, on May 28, 1902, the lower court denied the motion and entered judgment on the verdict. From this judgment defendant has appealed, and respondents now move this court to dismiss the appeal upon the ground that the questions sought to be raised by this appeal were raised, or could have been raised and determined, on the former appeal by the plaintiffs, and are therefore *res adjudicata*.

When the case was before us upon the former appeal, the respondents sought to sustain the order of the lower court by showing that the motion should have been granted

upon other grounds than the one stated by the trial court, but we then held that where the order was granted upon one question, and that a question of law only, and the ruling thereon was erroneous, we would not determine whether the motion should have been sustained upon other grounds. We therefore refused to review the questions upon which the lower court ruled against the defendant on the motion. To now dismiss the appeal for the reasons stated in the motion therefor would, in effect, be a denial of the right of appellant to have the rulings which it claims as error reviewed in this court. Without entering into a discussion of the question whether the ruling upon this point on the former appeal was correct, it is sufficient to say that the former opinion is the law of this case upon the points decided therein, and that, since the defendant was not permitted to review the errors claimed by it on plaintiffs' appeal, it should now be granted a review of them on its own appeal.

The motion is therefore denied.

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[No. 4874. Decided October 1, 1902.]

THE STATE OF WASHINGTON *on the Relation of Howard E. Foster v. SUPERIOR COURT OF KING COUNTY.*

PROHIBITION, WRIT OF — ERRONEOUS EXERCISE OF JURISDICTION.

Prohibition will not lie to restrain the superior court from passing upon questions raised by demurrer, when it has jurisdiction, even if such jurisdiction is erroneously exercised; and the fact that no remedy is afforded by appeal or certiorari for the review of such erroneous action would not alter the rule.

Original Application for Prohibition.

George B. Cole, for relator.

Allen, Allen & Stratton, for respondent.

Oct. 1902.] Opinion of the Court.—MOUNT, J.

The opinion of the court was delivered by

MOUNT, J.—Petition for writ of prohibition against the superior court of King county. The relator filed a complaint in the court below, praying for a money judgment against one H. F. McClure in the sum of \$116.80. Thereafter the said McClure filed an answer in said cause, which answer denied many of the allegations of the complaint, and also pleaded a counterclaim, and prayed for judgment against the plaintiff for \$198.90. To this answer the relator filed a motion to strike parts thereof. This motion being denied, the relator filed a general demurrer, which was also denied by the court. Relator now seeks to prohibit the lower court from considering the allegations of the said answer.

It will be readily seen that this is an effort to review by prohibition an alleged error of the lower court in overruling the demurrer. The court below certainly had jurisdiction to pass upon the questions raised by the demurrer, and its ruling, even if error, cannot be reviewed here upon petition for prohibition, because "it matters not whether the court below has decided correctly or erroneously; its jurisdiction being conceded, prohibition will not go to prevent an erroneous exercise of that jurisdiction." *State ex rel. Lewis v. Hogg*, 22 Wash. 646 (62 Pac. 143); *State ex rel. Vincent v. Benson*, 21 Wash. 571 (58 Pac. 1066); *State ex rel. Light Co. v. Superior Court*, 20 Wash. 502 (55 Pac. 933); *State ex rel. Cann v. Moore*, 23 Wash. 115 (62 Pac. 441); *State ex rel. White v. Board of State Land Comrs.*, 23 Wash. 700 (63 Pac. 532).

It is argued, however, that because the amount involved is less than \$200, and there is no remedy by appeal or certiorari, therefore the writ of prohibition will be issued. This position is necessarily in conflict with the rule, announced in the authorities cited above, that prohibition will

not go to prevent an erroneous exercise of jurisdiction. The office of prohibition is to prevent the lower court from assuming to exercise jurisdiction where it has none, or is acting in excess thereof. In such a case, where there is no appeal or other means of review, the writ will issue, but where, as in this case, the court is acting within its jurisdiction, and there is no appeal, prohibition will not lie to review an alleged error.

The writ will therefore be denied.

REAVIS, C. J., and FULLERTON, HADLEY, ANDERS and WHITE, JJ., concur.

DUNBAR, J. (concurring). I concur in the result for the further reason that it makes no difference, as has often been decided by this court, whether the court was acting with or without jurisdiction of the subject matter, if the question does not involve the legal existence of the court and denies all jurisdiction and not the particular jurisdiction complained of. This is what was decided in *State ex rel. Light Co. v. Superior Court, supra*, and *State ex rel. Vincent v. Benson, supra*, and *State ex rel. McIntyre v. Superior Court*, 21 Wash. 108 (57 Pac. 352).

[No. 4894. Decided October 1, 1902.]

N. W. PRESCOTT, *Appellant*, v. PUGET SOUND BRIDGE AND DREDGING COMPANY, *Respondent*.

APPEAL — DISMISSAL — FAILURE TO FILE TRANSCRIPT — IMPOSITION OF TERMS.

Under Laws 1901, p. 29, § 2, which provides that the transcript on appeal shall be prepared, certified and filed in the office of the clerk, at or before the time when the appellant serves and files his opening brief, the failure of the appellant to have such transcript

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Oct. 1902.] Opinion of the Court.—HADLEY, J.

filed before serving and filing his brief will, on motion of respondent, subject him to the imposition of terms in order to entitle him to the further prosecution of his appeal.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Dismissal of appeal denied.

Byers & Byers, for appellant.

Ballinger, Ronald & Battle and *Thomas M. Vance*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Respondent moves to dismiss the appeal in this cause upon the ground that no transcript of the records and files of the cause material to a review of the matters embraced within the appeal was filed at or before the time when appellant served his opening brief upon respondent's attorneys, and for the further reason that no such transcript was filed after the service of the brief, and before this motion was made. The motion directly calls for a determination of the force and effect that shall be given to a provision found in § 2, page 29, Laws 1901. That portion of the section directly involved here reads as follows:

“ . . . said transcript to be so prepared, certified and filed, in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief, . . . ”

We have not heretofore passed directly upon the question raised here. In *Raymond v. Bales*, 26 Wash. 493 (67 Pac. 269), a similar motion was interposed, but not until after the record had actually been supplied by the filing of the transcript. The motion was denied, and the decision was based upon that of *Gustin v. Jose*, 10 Wash. 217 (38 Pac. 1008), where it was held that a motion to dismiss an appeal for failure to send up the record to this court within the statutory time will not be granted when the motion

is not made until after the appellant has actually furnished the record. Referring to the last named case, in *Raymond v. Bales, supra*, we said:

"This motion seems to be analogous to the one under consideration in the above case. It was not made promptly after the service of appellant's brief while the default existed, followed by a short record brought here upon the motion, but was raised for the first time in respondent's brief, long after the record was supplied, and was submitted to this court at the time the cause was submitted on its merits. Whether, if the motion had been seasonably made as above indicated, we should have considered it one that should be granted, it is not necessary to decide; but for reasons aforesaid the motion is denied."

It will thus be seen that in that case the precise question presented here was left open. We declined to declare the effect of the statute under such conditions as prevail here, for the reason that the question was not directly included in that case. Here, however, the motion was made while the record was unsupplied, and was promptly brought here by a short record.

The notice of appeal was served July 21, 1902. Under a further provision of the statute above cited, a transcript may be filed in the office of the clerk of the superior court at any time within ninety days from said July 21st, and may be sent to this court within four months from said date. The ninety day period has not yet expired. To grant this motion unconditionally at this time would be, in effect, to say that, when an appellant serves and files his opening brief before the expiration of ninety days from the date of his appeal, he thereby shortens the statutory time within which a transcript may be filed. We do not believe the statute should be so construed. It will be observed, by reference to the statute, that the preparation, certification, and filing of the transcript are all made the duties of the

Oct. 1902.] Opinion of the Court.—HADLEY, J.

clerk of the superior court, and it is made mandatory that he shall discharge those duties within ninety days after an appeal shall have been taken; but he has fully ninety days within which to do it. The expense thereof shall be paid by the appellant, and he shall also inform the clerk what records and files he deems material to the review of the matters embraced in the appeal; but, further than that, the appellant has nothing more to do pertaining to the transcript. It is possible for an appellant to fully discharge his duty in the premises, and afterwards serve and file his opening brief before the clerk has prepared and filed the transcript, which the clerk may yet do within the ninety days. Should such conditions be held perforce to oust the jurisdiction of this court, and effect a dismissal of an appeal? We think not. We believe the provision of the statute of 1901 invoked here cannot be held to reach the jurisdiction of this court since such a holding would have the effect to abridge both the statutory period for filing the transcript in the office of the clerk of the superior court, and also that for filing it in the office of the clerk of this court. We think, in view of the whole statute, that the provision invoked must be held to be a directory one, and as declaring a mere statutory rule of procedure, the violation of which does not *per se* oust the jurisdiction of this court. The evident purpose of the statute was to provide that, when the respondent shall receive the appellant's brief, he shall at once be able to find the transcript on file, so that he may both know what it contains, and may also, in his answering brief, make proper reference to its pages for the convenience of this court. The rule is a wholesome one since the time within which the respondent's brief must be filed begins to run from the date of service of appellant's brief, and if the respondent finds no transcript on file he may be put to the inconvenience of delay

Syllabus.

[30 Wash.]

in the preparation of his brief, or of having to prepare it without examination of the transcript, or without proper reference to it. The appellant is not required to serve and file his opening brief until just before the close of the ninety days within which the transcript may be filed. If there has been delay in the filing of the transcript, the two may be filed contemporaneously, and the respondent thus saved the inconvenience of having his brief filing period already running before he can see the transcript. While we do not hold that the language of the statute quoted establishes a jurisdictional requirement, yet for the violation of such a statutory rule some kind of terms must be imposed upon the appellant in order to give the statute wholesome effect; and we think the further prosecution of the appeal should be conditioned upon the performance of the terms imposed.

The motion is, therefore, denied, subject to the condition that within fifteen days from the time of receiving notice of this decision the appellant shall pay to respondent the sum of \$20; otherwise, the motion will be granted.

REAVIS, C. J., and FULLERTON, MOUNT, ANDERS and WHITE, JJ., concur.

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[No. 4854. Decided October 1, 1902.]

JOHN EMIL JOHNSON, *Respondent*, v. SAN JUAN FISH & PACKING COMPANY, *Appellant*.

APPEAL — TIME OF FILING TRANSCRIPT.

An appeal will not be dismissed because of appellant's failure to file a transcript of the record at or before the time he served and filed his opening brief, where the motion to dismiss is not made until after the record is supplied.

Oct. 1902.]

Opinion Per Curiam.

Appeal from Superior Court, King County.—Hon. ARTHUR E. GRIFFIN, Judge. Dismissal of appeal denied.

Bogle & Richardson, for appellant.

George Revelle and *John Larrabee*, for respondent.

PER CURIAM.—Respondent moves to dismiss this appeal on the ground that appellant failed, as provided by § 2, page 29, Laws 1901, to have prepared, certified, and filed, a transcript of the record at or before the time it served and filed its opening brief. The record shows that appellant's opening brief was filed in the office of the clerk of the superior court on the 26th day of June, 1902, and the transcript was not filed until July 30th following. The service of this motion was, however, not made upon appellant's attorneys until the 1st day of August, 1902, which was after the transcript had been filed. In *Raymond v. Bales*, 26 Wash. 493 (67 Pac. 269), a similar motion was denied for the reason that it was not made until after the record was supplied. In *Prescott v. Puget Sound Bridge & Dredging Co.*, *ante*, p. 158 (70 Pac. 252), a similar motion was promptly made, and a short record brought here before the transcript was supplied. In that case the motion was also denied, but accompanied with the imposition of terms to be performed as a condition for the further prosecution of the appeal. However, under the rule announced in *Raymond v. Bales*, *supra*, no terms should be imposed here, and the motion must be unconditionally denied.

[No. 4181. Decided October 2, 1902.]

HENRY W. STERRETT, *Respondent*, v. NORTHPORT MINING AND SMELTING COMPANY, *Appellant*.

TRIAL — EXCEPTIONS TO INSTRUCTIONS — TIMELINESS.

Exceptions to the giving and the refusing of instructions will not be considered on appeal, where they were not taken until after verdict.

PLEADING — VARIANCE — ACTION FOR TOTAL DESTRUCTION OF PROPERTY — PROOF OF PARTIAL DESTRUCTION.

Under Bal. Code, § 4949, which provides that no variance shall be deemed material, unless it shall have actually misled the adverse party, the fact that plaintiff proved only a partial destruction of his property by reason of the fumes arising from defendant's smelter, while his complaint asked damages for the total destruction of his property, would be but an immaterial variance.

INJURIES CAUSED BY SMELTER FUMES — SUFFICIENCY OF EVIDENCE.

In an action to recover damages for the destruction of plaintiff's farm for agricultural and fruit raising purposes, the denial of a nonsuit was proper, where the evidence showed that the smelter was located a mile away from plaintiff's land about the middle of the year 1898; that the fruit trees on plaintiff's land were having a thrifty growth in the fall of the year 1898; that in the spring of 1900, after the fumes from the smelter hung for several hours in the atmosphere, the blooms on the trees became blighted and nothing in the way of fruit formed; that the leaves had a brown, cooked appearance and the alfalfa appeared bleached; that no fruit was gathered from the orchard in 1900, and the strawberry crop was greatly damaged in that year; that some such effect was noticed during the year 1899, but not so much; that, as shown by expert testimony, the presence of sulphuric acid released in the atmosphere by the roasting of ores would produce such effects, and, if continued, would ultimately kill the vegetation in the vicinity.

SAME — LIMITATIONS.

The fact that a smelter would inevitably occasion the damage for which plaintiff sues would not start the running of the statute of limitations from the first operation of the smelter, but the right of action would accrue only at the time the fumes began to cause damage.

Oct. 1902.] Opinion of the Court.—WHITE, J.

SAME — CONTINUING NUISANCE.

The operation of a smelter, although a lawful business, is one which is sure to destroy vegetation upon which the fumes and smoke therefrom may be precipitated, and hence constitutes a continuing nuisance for which damages are recoverable for any period within two years prior to the commencement of action.

Appeal from Superior Court, Spokane County.—Hon. FRANK H. RUDKIN, Judge. Affirmed.

Heyburn & Heyburn, for appellant.

Robertson, Miller & Rosenhaupt, for respondent.

The opinion of the court was delivered by

WHITE, J.—This is an action brought to recover from the appellant damages in the sum of \$30,000 for the total destruction of the respondent's property. Omitting formal allegations and the allegations as to the title of respondent to certain lands, which were admitted upon the trial, the complaint is as follows:

"That said land so described was near the towns of Rossland and Northport where agricultural and orchard land is scarce and the same was especially adapted for the growing of fruit trees and the raising of fruit thereon, including berries and vegetables, for all of which products there was at all times herein mentioned and will continue to be a ready market at high prices, and was also a good location and well adapted for a dairy farm, poultry and live stock; that this plaintiff cleared a large tract of land, more than ten acres in extent, and prior to the first day of January, 1898, had planted a large number of fruit trees, and the said trees on or about the first day of January, A. D. 1899, were of the average age of five years, healthy and promising, and this plaintiff on the said last mentioned date had also cleared more than three acres of land and had the same planted in strawberries, which said berry beds were then and had theretofore been prolific in the production of strawberries, and on said date this plaintiff had upon said land 1,400 fruit trees, 900 of which were apple trees, besides

cherry trees, plum trees, pear trees, prune trees and peach trees, which composed the remainder of said orchard, and there was of said land then and there adapted for orchard and fruit purposes more than fifty acres, which said land was of great and increasing value, and said entire land of this plaintiff was covered with growing timber suitable for mining, building and other purposes of the value of two thousand dollars and more, so standing upon said described property.

"That the said defendant corporation at all the times herein mentioned was engaged, and is now engaging, in conducting a smelter in the northern part of said city of Northport, and about one mile from the above described land, the property of plaintiff, at which smelter the defendant smelts the ores of the Le Roi mine, situated at the city of Rossland, British Columbia, together with other ores, and that all of the ores so smelted are composed of gold and silver combined with pyrites of iron and copper, all of said ores being known as base ores and containing large quantities of arsenic and sulphur, and when smelted or roasted, said ores by reason of said sulphur and other substances therein contained, to this plaintiff unknown, give forth sulphurous and other noxious fumes, deleterious to vegetable life and unpleasant and deleterious to man and cattle, and the same in the vicinity of said smelter, and more especially upon the land and home of this plaintiff, was and now is a nuisance.

"That within the last two years the said defendant smelting company has caused to be piled at and alongside of said smelter and upon piles of faggots and wood large quantities of raw ore from said mine, which, when so piled upon said faggots and wood, the said defendant company has fired said wood thereunder, and that said wood ignites the sulphur in said base ores, and so the said piles continue to burn until most of the sulphur is consumed out of the said ores, and that the said defendant has, during said years 1899 and 1900, caused to be roasted in said piles, known and called generally in mining stink piles, large quantities of ore, to-wit, about one million tons, and the said sulphur fumes and smoke, without in any way being confined or

Oct. 1902.] Opinion of the Court.—WHITE, J.

controlled, at all the times herein mentioned have been and are permitted by the said defendant to hover in the air at and near said smelter, and more particularly over and above the lands of this plaintiff, and to fall and be precipitated upon the lands, plants and trees heretofore described, the property of the plaintiff, and, by reason of the said fumes so released by the said defendant in the process of smelting its ores, all the vitality in the soil and land of plaintiff has been destroyed, all of the fruit trees above named, mentioned and described have been killed and rendered unproductive of fruit; all of the growing timber upon said land has been destroyed, and the value of the said property as a home for the plaintiff has been destroyed, and neither plaintiff or cattle can secure any substance out of the said land, the same being by the defendant entirely and totally destroyed and rendered useless and of no value for bearing fruit, orchard, vegetable, or any other purpose for which the said land was specially adapted, and so the entire value of the said land has been totally destroyed by the defendant company, to the great damage of this plaintiff.

"That the value of said orchard at the time the same was so destroyed by this defendant was of the reasonable value of fifteen thousand dollars (\$15,000), and the remaining part of said farm, including said growing timber, berry bushes, etc., was of the reasonable value of fifteen thousand dollars (\$15,000); that the entire value of said farm for any and all purposes has been destroyed by the said defendant so that the same is now totally worthless and of no value whatever; that the said fumes have so precipitated themselves over and upon this land as to permanently destroy the same for the purposes for which it was used by this plaintiff and for any and all other purposes whatsoever, to the damage of this plaintiff in the sum of thirty thousand dollars."

The appellant, for answer, alleged that the action was barred, because not commenced within two years after the cause of action accrued. § 4805, Bal. Code. The appellant further alleged that it had been engaged continuously in milling and roasting ores at its smelter since the 22d

day of July, 1898. The other allegations of the complaint, as to the adaptability of the land for the purposes alleged, the clearing of the land, the fruit trees, etc., on the land, the smelting of ores being a nuisance, and the damages averred, were denied. The jury, by its verdict, assessed the damages of respondent at \$5,000, and on this verdict judgment was entered. The complaint in this action was filed on February 19, 1901. The trial of the cause was commenced on the 12th day of June, 1901, and the verdict of the jury, as disclosed in the record, was returned on the 14th day of June, 1901. On the 17th day of June, 1901, certain exceptions to the instructions given and refused by the court were filed by the appellant. No other exceptions to the instructions given or refused, save as stated, were taken. The respondent claims that no exceptions were taken to the instructions given or refused in the manner provided by law, and that this court cannot now consider such exceptions. We agree with the contention of the respondent in this respect. This matter has been recently passed upon by us. *State v. Vance*, 29 Wash. 435 (70 Pac. 34). We there announce the reasons for adhering to this rule. We shall not, therefore, consider the errors assigned relative to the giving and refusing to give certain instructions.

The appellant, at the close of the respondent's testimony, moved the court to dismiss the action because not commenced within the time allowed by statute, and, on the refusal of the court to grant said motion, duly excepted. The appellant then moved the court for a nonsuit, for the reason that the appellant had failed to prove the allegations of the complaint. This motion was denied, and the appellant duly excepted. Under these exceptions two propositions are advanced and discussed by the appellant: (1) That the two-year statute of limitations had run when this action

Oct. 1902.] Opinion of the Court.—WHITE, J.

was commenced ; (2) that the proof of damages was in less amount than that pleaded in the complaint ; that the action was for the full value of the property ; that the proof failed as to the total destruction of the property, and, under the allegations of the complaint, the respondent could not recover for partial destruction, and that any proof as to injury which did not result in total destruction should not have gone to the jury. The Code provides :

“No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just.” Bal. Code, § 4949.

The appellant did not claim at the trial, and does not now claim, that it has been misled by the allegations of the complaint. It is axiomatic that the whole is greater than the parts, the whole includes the parts ; and, under the allegation of total destruction, in view of § 4949, *supra*, a partial destruction might be shown. The respondent’s farm was less than a mile in a direct line from the appellant’s smelter. In the early spring of 1899 there were on the farm 1,344 fruit trees, consisting of apple, pear, prune, peach, plum, and apricot trees ; the apple trees, 933 in number, being from three to four years old. This orchard occupied about fourteen acres, thoroughly cleared. From this orchard a ditch for irrigation purposes extended to Deep Creek, about a mile, with an ample flow of water. This ditch cost in the neighborhood of \$1,500. The trees were making a thrifty growth in the fall of 1898. In the spring of 1900, when the trees were in bloom, after the fumes from the smelter hung for several hours in the at-

mosphere, the blooms seemed to be blighted, and nothing in the way of fruit formed. Some effect from the fumes on the leaves of the trees could also be seen. They had a brown, cooked appearance. The alfalfa had a bleached appearance. Some such effect was observed in 1899, but not so much. The worst damage seems to have been done in 1900. No fruit was gathered from the orchard in 1900. The berry crop was also greatly damaged in that year. Where there should have been 500 crates, there were only 120 crates. Berries were worth from \$3.60 to \$1.20 per crate. There was evidence tending to show that the orchard, small fruit, herbage, and forest trees were destroyed or injured by the fumes from the ore piles and smelter, and that this destruction was general in 1900. The testimony showed that the fruit trees in the orchard were worth \$5 per tree before they were destroyed; that the orchard before its destruction, would pay interest on an investment of \$1,000 per acre; that the tract of land mentioned in the complaint consisted of 160 acres, and that there were forest trees on the land outside of the orchard, and they were affected and injured by the fumes. The fumes also affected vegetation such as alfalfa and grass. The respondent testified that, in his judgment, the property was totally destroyed. He further testified, in effect, that he did not become convinced in his mind that the fumes destroyed the crops and trees, etc., and ruined the place, until in July or August, 1899. There was some testimony as to the value of the forest trees that were injured. There was testimony that the appellant commenced roasting ores and sending forth the destructive fumes in the spring of 1898. There was testimony by witnesses other than the respondent as to the damages, the amount thereof, and that the material damage became noticeable in the fall of 1899. There was evidence to go to the jury of at least the partial

Oct. 1902.] Opinion of the Court.—WHITE, J.

destruction of the fruit trees, berries, and forest trees and vegetation in 1899 and 1900, and that it was in those years the damage became appreciable; estimates of this damage were also testified to. The following is part of the examination of a witness for the respondent, who testified as an expert:

"Q. Suppose, for instance, on a cloudy day there should be a cloud immediately above the smelter, what would occur, if anything, when the smoke approached that cloud? A. The smoke would be observed to a large extent about the cloud. Q. And if rain fell from that cloud in the vicinity, what effect if any would that rain have upon the vegetation? A. It would have a blighting effect and wilt the leaves, burn the leaves. Q. Do you know of any instance in any standard authority with reference to how quickly such blight would occur? A. Yes, sir. Q. State to the jury. A. Peters gives an instance where a cloud absorbed the smoke from a number of roast heaps and the rain falling from this cloud eight miles distant from the roast heaps withered a corn field in less than an hour and a half, completely destroyed a young, growing corn field. Q. Now, Mr. Snyder, suppose that a smelter that releases in the atmosphere approximately seventy tons of sulphur per day [there was evidence showing that that was the amount released by this smelter when in operation] in the form of sulphurous acid, is in constant operation for two years or more; that an orchard about one mile from the smelter and in the direction of the prevailing winds is scorched in the spring so that the blooms drop from the trees, and thereafter the leaves are scorched so that they drop off and new growth occurs, and there is no fruit grown in the orchard; that it is well irrigated and well cultivated the second year, and in the springtime the same effects are visible, only more so; the leaves are scorched in the entire orchard so that they are browned and the orchard looks like it is dead, and it produces no fruit that year, and the smelter is continued in operation, state to the jury what you would say would be the cause of that effect on that orchard, being only one smelter in the neighborhood."

This question was objected to, and the court ruled that the witness could answer whether or not the fumes from the smelter would produce these results. The witness answered:

"Yes, sir, they would produce those results."

The question was then asked the witness:

"What would be the effect if that amount of sulphur were released in the atmosphere for more than two years immediately prior say to this suit upon the health of this orchard?"

The witness answered:

"You might say it would destroy the health of the orchard. While it might come in leaf again, the leaves would be destroyed before long by the fumes—from the effect of the fumes. Q. Would such trees recover or not? A. If the cause was kept up *they would eventually die.*"

There was testimony tending to prove all the facts suggested in the hypothetical question referred to as being existing facts. We do not think, therefore, that the court erred in denying the motion for a nonsuit.

It is claimed by the appellant that it erected its plant and operated it by authority of law. There is no allegation in the complaint that the fumes escaped through careless management, or by reason of negligent construction. The results are necessary results arising from the character of the ore smelted and the manner of operating the smelter. The smelter is not operated in any manner different from that in which smelters are usually operated. The business carried on is a lawful business. The fumes are poisonous and destructive. No way to overcome the difficulties has ever been found. It was, therefore, a foregone conclusion, when the smelter was erected and began operations, that the vegetation that happened to grow where the fumes and smoke should be precipitated would be subject to death.

Oct. 1902.] Opinion of the Court.—WHITE, J.

The smelter was erected before, and began its operations on, July 22, 1898. From these premises the appellant contends that the cause of action accrued July 22, 1898, and, as the complaint was not filed until February 19, 1901, the two-year statute had then run. It is elementary that the statute of limitations begins to run against a cause of action from the time it accrues and becomes due and payable; or, as otherwise expressed, the cause of action or suit arises, according to the universal rule in courts of both law and equity, when and as soon as the party has a right to apply to the proper tribunal for relief. *Ganser v. Ganser*, 83 Minn. 199 (86 N. W. 18, 85 Am. St. Rep. 461).

The appellant cites us to the case of *Rowlstone v. C. & O. Ry. Co.*, 54 S. W. 2 (21 Ky. Law Rep. 1507). In that case the petition stated that the company did, without right, occupy Washington street, in the city of Covington. The answer controverted this statement, alleging that it occupied Washington street by right and by authority of law. There is no allegation that the noises, jars, steam, smoke, cinders, blowing of whistles, and gases were unnecessary or unusual in the careful and prudent operation of the trains over the tracks on Washington street. The court of appeals of Kentucky says:

“We are of the opinion, from the proof in the bill of exceptions, that appellees proved an undoubted right to use Washington street for their railroad tracks, and to operate their trains thereon, and also proved that such use had been for more than five years before the institution of this action. If, therefore, the action be for such damage as will necessarily result from the prudent operation of the road (that is, from noises, smoke, cinders, and such like incidents of the necessary and prudent and careful operation of the trains) the cause of action is barred by the statutory limitation of five years pleaded and proven.” *Louisville & N. R. R. Co. v. Orr*, 91 Ky. 109 (15 S. W. 8); *Stickley v.*

Chesapeake & O. R. R. Co., 93 Ky. 323 (20 S. W. 261); *Onions v. Covington, etc., Ry. Co.*, 21 Ky. Law Rep. 820 (53 S. W. 8).

Quoting further from said decision, the court says:

"We are of the opinion that the rule announced in the Orr case is the law. That rule, as we understand it, is: The statute of five years' limitation will bar any claim for damages resulting from the necessary and prudent operation of a railroad, along or over a street. But, for any damage in operating the trains that by proper precaution could be prevented, the company would be liable, and for this damage a cause of action does not accrue until the wrong is done, and limitation runs only from that time.

. . . If the action had been for negligent or improper use of appellees' cars and trains on Washington street, an entirely different case would be presented. . . . It is for the use of Washington street without right or authority—wrongful use—a trespass on the street, and consequent injury to appellant. To constitute an action for negligence or improper use, there must have been an averment in the petition that these noises, jars, smoke, cinders, etc., complained of were unusual and unnecessary in the careful and prudent operation of the road, or that by prudent operation of the road, such might have been prevented. There appears no such allegation, "

In *Louisville & N. R. R. Co. v. Orr*, *supra*, the court says:

"A railroad must be regarded as a permanent structure, and, when its construction in the streets of a town or city is authorized by legislative and municipal authority, it cannot be said to be a nuisance when operated in a careful and proper manner. All damages that would naturally result from the operation of the road can be ascertained and determined when the road is being constructed, or rather when it is operated, so as to show the damages that will necessarily result from its prudent management. . . . They all may be recovered in a single action, and, therefore, the statute of limitations begins to run from the

Oct. 1902.] Opinion of the Court.—WHITE, J.

time the action could have been first instituted. . . . In ordinary actions for trespass to real estate the recovery is for the injury accruing up to the inception of the action; but, where a railway is constructed in a street, the injury, if any, to the adjacent property is permanent in its character, and continuing as long as the road is operated, and the cause of action for the damages resulting from its prudent operation arises as soon as the cars begin to run, and in the estimate is included the future operation of the road; for, if otherwise, there would be a cause of action for every time the cars passed the dwelling of the owner."

In the case of *Parker v. Atchison*, 58 Kan. 29 (48 Pac. 631), the court says:

"Power is also given to the city to alter and change the channel of streams and water courses. Gen. St. 1889, par. 555. In doing so, however, reasonable care should be exercised to avoid unnecessary injury to private property. It appears, therefore, that the improvement was authorized and cannot be said to be illegal. The fact that there is statutory authority for the same does not exempt the city from liability for injury to private property. In making the improvements, it is not required to provide for extraordinary floods, and storms, but must exercise reasonable care to guard against such conditions as are ordinarily incident to the creek. It would seem from the testimony that the mere improvement of the alley could not have operated as a very serious injury to the property of the plaintiffs in error, but assuming that it was injured to some extent, they were too late in claiming a recovery. As the improvement is permanent in its character, but one action could be maintained, in which all damages, present or prospective, would be recoverable. The action accrued in 1884, when the structure was completed, and under the third subdivision of section 18 of the Civil Code, it was barred at the end of two years."

The appellant contends that the principle announced in these decisions is applicable in the case at bar. We think not. From the very moment the cars began to be operated

the damage existed and was apparent, and the present and prospective amount thereof could be ascertained by proper proof. In announcing the rule as laid down in the *Orr Case*, the Kentucky court of appeals said, "A cause of action does not accrue until the wrong is done." Supposing, in the case under consideration, the wind had not carried the fumes over the respondent's land until six months after the smelter commenced operations, could it be said that there was any wrong done to the respondent during the six months? The evidence tends to show that the damage actually done was not apparent or material until in the month of July or August, 1899. Not until that time was the wrong done to the respondent for which a right of action for damages accrued. An action to recover damages for an injury cannot be sustained until the injury actually occurs, although it may be apparent that injury will inevitably result. A cause of action to prevent the injury by injunctive relief might exist, but a cause of action to recover damages commences to run from the time the damages occur by the injury or destruction of property claimed to have been damaged. It is lawful to operate a smelter. No one has a right, however, to pursue a lawful business, if thereby he injures his neighbor, without compensating such for the damages actually sustained. This action may be sustained also on the grounds of a continuing nuisance. *Doran v. Seattle*, 24 Wash. 182 (64 Pac. 230, 54 L. R. A. 532, 85 Am. St. Rep. 948).

The judgment of the court below is therefore affirmed.

REAVIS, C. J., and HADLEY, FULLERTON, ANDERS, MOUNT and DUNBAR, JJ., concur.

Oct. 1902.]

Opinion Per Curiam.

[No. 4424. Decided October 2, 1902.]

THE STATE OF WASHINGTON *on the Relation of Norris Safe & Lock Company v. SUPERIOR COURT OF KING COUNTY.*

CERTIORARI — WHEN LIES — REMEDY BY APPEAL.

The supreme court will not review an order of the superior court restraining interference with a receiver's possession of a certain building which was claimed by other parties, since there is a remedy by appeal from such order.

APPEAL — STAY OF RESTRAINING ORDER — SUPERSEDEAS BOND.

Upon a showing of the superior court's refusal to fix the amount of a supersedeas bond staying the execution of a restraining order pending appeal, the supreme court, although denying the writ of certiorari in the cause, will direct the lower court to fix the amount of such bond.

Original Application for Certiorari.

William Martin, for relator.

Roberts & Leehey, for respondent.

PER CURIAM.—Application for review. The relator seeks to review by certiorari a certain order made by the superior court of King county in the matter of a receiver in the case in which one Schwartz was plaintiff and the Chicago Furniture & Stove Co., a corporation, defendant, entered on the 22d day of September, 1902. The respondent moves to quash the writ on the ground that an adequate remedy exists in appeal. The order made by the court in substance restrained relator, its agents, servants, and employees, from entering into or conducting business in a certain building on Second avenue, in Seattle, of which the court found that the receiver in said action was in possession, and which possession was disputed by relator; and, it appearing that said order may be reviewed

on appeal, the motion to quash is sustained. It thereupon being shown to the court that relator had applied to the superior court to fix the amount of the supersedeas bond staying the execution of said order pending appeal, and the court refusing to make such order, and counsel requesting that an order be now issued from this court directing the superior court to fix the amount of such supersedeas bond, it is therefore ordered that the superior court fix the amount of such supersedeas bond staying the enforcement of the said order of that court pending the appeal.

[No. 4110. Decided October 8, 1902.]

AMERICAN COPPER, BRASS & IRON WORKS, *Respondent*,
v. GALLAND-BURKE BREWING & MALTING COMPANY,
Appellant.

SALES — TIME FOR PERFORMANCE OF CONTRACT — EXTENSION — EVIDENCE.

In an action for the price of goods shipped by plaintiff to defendant, in which the plaintiff sought to establish a waiver of an agreement for liquidated damages for any delay in shipment, evidence that a stockholder of defendant, who was temporarily in plaintiff's city on other business, had expressly agreed to an extension of time for shipment is admissible, when letters of defendant, though subsequent in date to the alleged agreement for extension, carry the inference that such stockholder was defendant's authorized agent for the purpose.

BILL OF PARTICULARS — ADMISSIBILITY IN EVIDENCE.

A bill of particulars furnished by plaintiff in response to a motion by defendant is admissible in evidence on the part of defendant, although no order against plaintiff to furnish the bill is shown by the record as ever having been made.

SAME — HEARING OF EVIDENCE.

Conversations had by plaintiff with a former employee of defendant tending to show that defendant suffered no actual dam-

Oct. 1902.] Opinion of the Court.—**HADLEY, J.**

age by reason of plaintiff's delay in furnishing goods contracted to be delivered at a stipulated time under penalty of liquidated damages, are inadmissible on the ground of being hearsay.

Liquidated Damages — Showing of Actual Damage Unnecessary.

Under a contract providing for liquidated damages, it is not necessary to show in what manner or to what extent the party claiming thereunder has been actually damaged, but upon establishing a breach of the condition entitling him to such damages he should be awarded the stipulated sum.

Pleading — Admissions in Answer.

Where the complaint set up a written contract between the parties, and followed this with allegations of other matters which it averred were actually a part of the contract, but omitted by mistake, and the admission of the answer was merely that "the contract set forth in said complaint is a true copy of the contract between the parties hereto," and the case was tried on the theory that defendant admitted nothing outside of the written contract, it was error for the court to charge the jury that defendant admitted by its answer that the contract was as alleged in the complaint.

Appeal from Superior Court, Spokane County.—Hon. LEANDEE H. PRATHER, Judge. Reversed.

W. J. Thayer, for appellant.

Forster & Wakefield and *James W. Marshall*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This action was brought by respondent against appellant to recover a balance alleged to be due on a contract for furnishing certain equipments for a brewery then being constructed by the appellant. The contract was executed in writing and the provisions thereof material to be stated here were as follows:

"The American Copper, Brass & Iron Works agree to construct and build and deliver not later than the 1st of January, 1892, f. o. b. cars at Chicago, the following brewing equipments for the said Galland-Burke B. & M. Co. of

the size and quality of material and for the agreed price hereinafter stated, viz.: (Here follows a description of material.) All of said equipment to be furnished f. o. b. cars at Chicago for the sum of \$5,800 (five thousand eight hundred dollars), which sum the said Galland-Burke B. & M. Co. agree to pay for same, if up to specifications and contract and delivery made not later than Jan. 1, 1902. If later, then the said American C. B. & Iron Works are to deduct from said amount account of inconvenience, direct damage done to said G.-B. B. & M. Co. and as liquidated damages, the sum of \$25.00 per day for each and every day that delivery is made f. o. b. later than said 1st Jany., 1902."

The written contract is set out *in haec verba* in the complaint, and it is alleged that it was further agreed between the parties, at the time the contract was entered into, that the respondent should ascertain freight rates on the brewing equipment, and advise appellant, who was to decide and direct respondent whether to ship the equipment as a whole or "knocked down," and that appellant also then and there agreed that the penalty claims would not be enforced except in the most extreme case of neglect; that said last mentioned stipulations were made a part of the contract, but by oversight or mistake were not included in the written contract. It is further alleged that pursuant to the agreement appellant was notified by respondent concerning the freight rates, but that appellant failed to advise or direct respondent how to ship, and thereby occasioned delay in the delivery of the equipment. It is also alleged that appellant extended the time in which the goods were to be delivered, and that respondent did not deliver the equipment by January 1, 1892, because of said extension of time, as well as because of the failure on the part of appellant to advise as to shipment; but that, as soon as respondent was directed as to the shipment, it complied with its part of the contract in every particular. The answer ad-

Oct. 1902.] Opinion of the Court.—HADLEY, J.

mits that the contract set forth in the complaint is a true copy of the contract between the parties, and avers that by the terms thereof, if delivery of said goods was made after January 1, 1892, there should be deducted by respondent from the contract price the sum of \$25 per day, as liquidated damages for each and every day that delivery was made f. o. b. later than said date; that respondent did not make such delivery on or before said date, but delayed the same until sixty days after said date, to the great inconvenience and damage of appellant in the sum of \$1,500, which sum it asks shall be set off against the claim of respondent, and that appellant shall recover judgment against respondent. The allegations of the answer are denied by the reply. The cause was tried before a jury, and resulted in a verdict for the respondent in the sum of \$870. Appellant moved for a new trial, which was denied, and judgment was thereafter entered in accordance with the verdict of the jury.

It is assigned as error that the court permitted the witness Meinshausen, who was president of the respondent company, to testify as to the alleged statements made by Mr. Sam. Galland in relation to the shipping of the goods, it being claimed by appellant that Sam. Galland had no connection with its company, except that he owned some of its stock. The witness Meinshausen testified, in effect, that Sam. Galland waived for the appellant company the stipulation in the written contract that the goods were to be delivered on or before January 1, 1892. The respondent company and its manufacturing plant were located in Chicago, and the appellant company had ordered this brewing equipment to be manufactured for shipment to Spokane, to be used in appellant's brewery, then being constructed in Spokane. Sam. Galland went to Chicago, arriving there soon after January 1, 1892. He says he went there to be educated as a brewmaster. Whatever may

have been the primary purpose in going to Chicago, it nevertheless appears that while there he called at the respondent's place of business, and had some conversation with the officers of respondent company relative to the shipment of this brewing outfit. The witness Meinshausen testified that, when Sam. Galland called at the respondent's place of business, "we showed him these things, and everything was all ready, and he says: 'We are not ready. You can keep it as long as you want to. I will let you know when to ship it.'" Objection was made to the statement of any conversation between the witness and Sam. Galland until it was first shown that the latter had some authority to bind the appellant company. On the statement of respondent's counsel that they had a letter from appellant company which would show such authority, the court observed as follows: "If you propose to introduce a letter of that kind in evidence, I will not require you to withdraw the witness now and show that first; but it is incompetent testimony unless that is shown. I will overrule the objection now." The witness then proceeded to give testimony similar to that already mentioned, and also to the effect that under the instructions of Sam. Galland respondent proceeded to put the equipment together, so that it could be shipped "set up" ready to be put in place upon its arrival in Spokane; and that he so requested in order that the expense of sending men to Spokane to erect it might be avoided—all of which witness claimed was to the delay of respondent. Appellant urges that the letter showing authority from it to Sam. Galland, and to which counsel and court had theretofore referred, was never produced, and that the testimony of the witness should, therefore, not have been permitted to go to the jury under the trial court's own ruling. A letter was, however, produced, signed by the appellant company, and

Oct. 1902.] Opinion of the Court.—**HADLEY, J.**

directed to the respondent company, dated February 22, 1892, which was probably six weeks after the alleged conversation with Sam. Galland. This letter was in reply to one from respondent, dated the 18th of the same month, in which had been inclosed a statement of goods already said to be shipped, and which letter also advised appellant that a draft had been forwarded for one-half of the contract price. In the appellant's reply letter is the following: "It would not be right for us to pay the agreed amount $\frac{1}{2}$ until the stuff was shipped. On receipt of this, if you have sent kettle, Grant and cooler, why please satisfy our Sam. G. that stuff is coming forward and have him wire us and we will take care of draft." The above mention of "Sam. G." it is not disputed refers to Sam. Galland, and being over the signature of appellant, directed to respondent, concerning the subject matter of the shipment of the goods, we think it became a question for the jury to determine whether appellant had authorized Sam. Galland to represent it to the extent of making the statements concerning which the witness Meinshausen testified. It is true the letter was written some time after the alleged conversation, but it at least bore upon the matter of Sam. Galland's representative authority at the time it was written, and we think it was properly left with the jury to say whether authority theretofore existed.

It is next assigned that the court erred in refusing to admit in evidence, or order to be filed, a bill of particulars alleged to have been furnished by respondent. Early in the progress of the cause appellant moved the court to require respondent to furnish a bill of particulars showing on what dates respondent shipped the machinery. The motion appears among the files of the cause, but no order directing a bill of particulars to be furnished

appears in the record. Appellant produced at the trial a written statement purporting to be signed by respondent's attorneys, and which appellant claims was delivered to its counsel as a bill of particulars. No original bill of particulars appears to have been filed by respondent. At the trial appellant moved for an order requiring it to be filed. Thereupon the following occurred:

"The Court: If you show it was filed in compliance with the order of the court— Mr. Thayer: Well, I state to your honor it was, and counsel do not deny the signature. Mr. Forster: I haven't any doubt but what it was properly served. I have no recollection about it at all."

The court thereupon ordered the filing of the bill of particulars, but, it subsequently appearing that no order had theretofore been made in the record, the court observed as follows: "I will sustain the objection. The record does not show there ever was an order made for a bill of particulars. I do not remember any such order." Respondent's counsel stated that they did not have the original bill of particulars in their possession, and later in the trial appellant sought to introduce in evidence the aforesaid copy of what it claimed had been served upon it as a bill of particulars. One of respondent's counsel was called to the witness stand, and, upon being shown the copy, was asked if he had ever before seen it, or the original bill of particulars. The witness having stated that he refused to answer, without stating the ground of his refusal, the following occurred:

"The Court: On the ground that whatever it is would be a communication between client and attorney? The witness: No, sir. Upon the ground that there has no order been made for a bill of particulars, and your honor ruled last Saturday that the bill of particulars, as given

Oct. 1902.] Opinion of the Court.—HADLEY, J.

by the attorney, was not competent without an order directing a bill of particulars."

On further examination the witness stated that he had no recollection whatever about it. The copy bore date January 11, 1895, which was some years before the time of the trial. The action had been pending since 1892. The purported signature of the witness to the copy was, however, not denied. The purported signature of the firm of his co-counsel was made by a rubber stamp impression, but what purported to be the witness's signature was written with pen and ink. The copy recited upon its face that it was furnished in compliance with an order of the court theretofore made. Appellant offered it in evidence, stating as grounds in support of the offer that it was given in compliance with an order of the court; that it was a bill of particulars served by respondent's attorneys, and signed by them in response to a demand. Objection was then made by respondent, and the grounds stated were that the record showed no order of court for a bill of particulars, and, further, that the signature of Forster & Wakefield was not attached to the copy. The said signature was the one already mentioned as purporting to be attached by rubber stamp. No objection was made, however, that the pen-written signature of J. W. Marshall, co-counsel of Forster & Wakefield, was not genuine. The objection was sustained, it being the court's view that, in the absence of an order in the record directing a bill of particulars, the offered evidence was incompetent. We think this was error under the ruling of this court in *Howells v. North American, etc., Trading Co.*, 24 Wash. 689 (64 Pac. 786). We there held that a bill of particulars voluntarily furnished upon the oral request of counsel was as binding as though furnished under the order of the court. In the case at bar we think sufficient

had appeared to form a foundation for the admission of the offered evidence. Any explanations respondent might have desired to make concerning the same could have been shown by further testimony. The offered evidence was material to appellant's theory of the case, and we therefore think it was material error to reject it.

It is assigned that the court erred in permitting the witness Pagenstacher to testify as to a conversation which he had with Mr. Meinshausen, the president of respondent company. As has already appeared, appellant claimed under the contract liquidated damages at the rate of \$25 per day for each day the delivery of the machinery was delayed after January 1, 1892. The court ruled that, before appellant could recover damages under the liquidated damage provision of the contract, it must first appear that actual damage to a considerable amount had been sustained by reason of the delay in shipping the goods; and respondent sought to show that no considerable actual damage had been sustained, because it claimed that appellant's buildings at Spokane were not ready to receive the machinery on January 1st, and not until after the machinery had actually been received at Spokane. In attempting to prove that the buildings were not ready respondent introduced the deposition of said witness Pagenstacher. This witness had theretofore been in the employ of appellant, and had gone to Chicago, where he says he had a conversation with Meinshausen. He was asked what he said to him about the progress of the work upon appellant's brewery buildings in Spokane. Objection was made to the question on the ground that it called for hearsay testimony, and that any statements the witness might have made at that time upon that subject would not be binding upon appellant. The objection was, however, overruled, and the witness was permitted to tes-

Oct. 1902.] Opinion of the Court.—HADLEY, J.

tify that he told Meinshausen that the buildings were up to the third story, but that they were not ready to receive the machinery. It appears that this witness had at one time acted as superintendent of the construction of the brewery but had no other connection with appellant than as an employee. At the time of said conversation he was not even in appellant's employ, and there was no showing that he had any authority to speak for appellant. Under these circumstances we think the evidence was purely hearsay, and that it was error to admit it.

It is assigned that the court erred in instructing the jury to the effect that, before appellant would be entitled to a deduction of \$25 per day, claimed as stipulated damages under the contract, they must find that respondent failed to comply with its contract, and that such failure "did cause the defendants some material, considerable damage." We think the instruction was erroneous under the issues of the case. Appellant was claiming the right to recover by reason of the clause in the contract providing for stipulated damages, and the instruction had the effect to require it to prove actual damages before it could recover. It is true, under the modified agreement alleged by respondent it is claimed that it was agreed that liquidated damages would not be enforced unless there was substantial actual damage. But the alleged modified agreement was one of the disputed questions in the case. In *Reichenbach v. Sage*, 13 Wash. 364 (43 Pac. 354, 52 Am. St. Rep. 51), this court held that a provision in a building contract for the recovery by the owner of \$10 as damages for each day the completion of the building was delayed after the time stipulated was a provision for liquidated damages, and not for a penalty, and could be enforced. The court at page 367 said:

" . . . there is an element of uncertainty as to the real damages which would be maintained by the plaintiff which renders it more or less impracticable to be determined by a jury. Values of rents are fluctuating, and dwelling houses of the character and description of this one are ordinarily not built for rent at all, but for the convenience and comfort of the owners, and inasmuch as the parties saw fit to settle in advance the question of damages, and it seems to be on an equitable basis, we do not feel justified in disturbing that contract and holding that it was a contract which the parties had no right to make."

In the opinion in that case the court quoted approvingly and at length from *Dwinel v. Brown*, 54 Me. 470, a part of which quotation is as follows:

"Courts of common law cannot, like courts where the civil law prevails, award such damages as they may deem reasonable, but must allow the damages, whether actual or estimated, as agreed upon by the parties."

To the same effect is *Everett Land Co. v. Maney*, 16 Wash. 552 (48 Pac. 243). The following cases hold that, where damages for the breach of a contract are liquidated, it is not necessary to show in what manner or to what extent the party claiming under it has been actually damaged: *Pierce v. Jung*, 10 Wis. 30; *Kelso v. Reid*, 145 Pa. St. 606 (23 Atl. 323); *Sanford v. First National Bank*, 94 Iowa, 680 (63 N. W. 459); *Spicer v. Hoop*, 51 Ind. 365.

It is last assigned that the court erred in instructing the jury that appellant, by its answer, admitted the contract to be as alleged in the complaint. It will be remembered that the written contract was first set out in full in the complaint, and this was followed by allegations of other matters, which it is averred were actually made a part of the contract, but were omitted from the written agreement by oversight or mistake. The answer first generally denies all the allegations of the complaint "save

Oct. 1902.]

Syllabus.

and except such as are herein specifically admitted," and then proceeds as follows:

"The defendant admits the allegations as to the corporate character of the parties hereto, and that the contract set forth in said complaint is a true copy of the contract between the parties hereto, excepting that the contract is not signed on behalf of the American Copper, Brass & Iron Works by the person named in said complaint."

It seems manifest to us that the pleader did not intend to admit any portion of the contract alleged in the complaint, except what is referred to as "a true copy," etc., evidently meaning the *written* contract copied in the complaint. The whole case was tried on the theory that appellant did not admit the allegations of the complaint as to provisions in the contract not included in the written one. We therefore think it was error to instruct the jury that the contract as set out in the complaint was admitted, since they may have been misled thereby.

For the foregoing reasons, we think a new trial must be granted. The judgment is reversed, and the cause remanded, with instructions to the lower court to grant a new trial.

REAVIS, C. J., and FULLERTON, ANDERS, MOUNT, WHITE and DUNBAR, JJ., concur.

[No. 4256. Decided October 3, 1902.]

30	189
31	40
30	189
33	125

P. F. KLINE *et ux.*, Respondents, v. HENRY W. STEIN *et al.*, Appellants.

EJECTMENT — TITLE BY ADVERSE POSSESSION — INSTRUCTIONS.

Upon an issue of title by adverse possession in an action of ejectment, it was proper for the court to charge the jury that the open, notorious, peaceable possession of real estate, with a claim

Opinion of the Court.—REAVIS, C. J. [30 Wash.

of right thereto, for the period prescribed by the statute of limitations vested title in plaintiffs.

SAME — EVIDENCE — TRANSACTIONS WITH DECEDENT.

Under Bal. Code, § 5991, which excludes evidence of transactions had with a decedent, in an action of ejectment against the executors of the estate of a decedent from whom plaintiffs claimed to derive title sufficient to establish adverse possession, evidence on plaintiffs' part of having been put in possession of the land by decedent under an agreement for a deed which was subsequently executed, but by mistake failed to incorporate all the land of which they had been put in possession under their purchase, is inadmissible.

SAME — PREJUDICIAL ERROR.

Although there may be evidence sufficient to establish plaintiffs' title by adverse possession, which was the vital issue in the case, yet, where the evidence is conflicting, and the jury may have been influenced in their verdict for plaintiff by reason of the erroneous admission of testimony of transactions had with a decedent tending to establish plaintiffs' title, the error cannot be regarded as without prejudice.

Appeal from Superior Court, Kitsap County.—Hon. JOHN C. DENNEY, Judge. Reversed.

Samuel S. Carlisle and Charles E. Patterson, for appellants.

J. B. Yakey, Jesse Thomas and Thomas Carroll, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Action in ejectment. The complaint alleges that plaintiffs were seized in fee simple of about eight and one-half acres of land in Kitsap county, describing the same by metes and bounds; that about the 26th day of April, 1900, while plaintiffs were so entitled to possession, the defendants forcibly entered, and ousted plaintiffs therefrom. The answer denies the ownership of plaintiffs, and sets up ownership in the estate of Charles A. White, deceased, and the rightful possession

Oct. 1902.] Opinion of the Court.—REAVIS, C. J.

of defendants as executors of said estate. Plaintiffs replied, denying the title and ownership of said White to any of the premises at the time of the entry of defendants, and also showing that plaintiffs purchased the land from said White on the 16th of September, 1886. It further sets out that plaintiffs have been in the open, notorious, and peaceable possession of said premises for more than thirteen years before said wrongful entry of defendants, and urges such possession as establishing the bar of the statute of limitations in favor of plaintiffs. Upon the issues thus tendered by the pleadings, the case was tried. The plaintiffs produced evidence tending to prove that they were in open, notorious, peaceable possession, claiming ownership thereof, for more than thirteen years prior to the entry of defendants. The court instructed the jury correctly upon the law relating to proof of title by adverse possession,—in substance, that the open notorious, and peaceable possession of real estate with the claim of right thereto for the period prescribed in the statute of limitations vested title in plaintiffs. We find no error in the court's instruction upon this issue. But, while plaintiff P. F. Kline was testifying, his counsel asked him generally what connection, if any, he had with the land. The following then appears of record:

"Mr. Patterson. Your Honor, if this involves a personal transaction with Mr. White, the decedent in this case, we wish to object to this evidence as incompetent under the statute. The Court. I will let him answer the question. (Exception allowed). A. Well, I cleared that land,—fenced it and cultivated it since '86. Q. Well, how did you happen to go into possession of that land? A. Well, I bought it, and paid for it. Mr. Patterson. Object to this on the same ground, and ask that we be permitted at this time to ask, as preliminary to our objection, from whom he bought it. I think the evidence

will develop that he bought it from the decedent, Mr. White. The Court. I will let him answer the question."

On cross-examination, the witness stated he purchased the land from the deceased, White, and detailed on such examination that he paid for the entire premises, and that White himself staked off the land for plaintiff, and that plaintiff immediately fenced, cultivated, and improved the same, and remained in continuous possession thereof until ousted by defendants; that White afterwards executed a deed, and delivered the same to plaintiffs, intending to convey all the premises so inclosed and held by plaintiffs, but, through mistake in the description inserted in the deed, only a portion thereof was correctly described; that such mistake was not discovered until near White's death, and too late for correction. Counsel for defendants moved to strike all the testimony of the witness relating to this transaction with White, because it appeared made with one deceased. The motion was denied. Before submission of the case to the jury, the court instructed as follows:

"You are instructed that if you find from the evidence that Charles A. White measured off the land described in plaintiff's complaint, and sold the same to plaintiff P. F. Kline; and that Kline paid the agreed price to White for the land, and took actual possession by fencing, improving, or other actions of ownership, claiming it as his own,—that he at once, and without anything further, became the owner of the land, and no deed of any kind was necessary to make him the owner, but a deed, if afterwards made, would only be evidence of an ownership already acquired.

"You are instructed that if you find from the evidence that Charles A. White measured off the land claimed by plaintiffs, and that Kline paid the agreed price for the tract, and that Kline then and at once took actual possession of the land, claiming it as his own, that it there-

Oct. 1902.] Opinion of the Court.—REAVIS, C. J.

upon became his land; and the fact that a defective deed was thereafter executed by White to Kline would not defeat Kline's title."

Section 5991, Bal. Code, declares:

"No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: Provided, however, That in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, . . . then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased . . . person."

It would seem that the admission of this evidence was unauthorized under the statute. The policy declared is well understood. It was before this court in *Smith v. Taylor*, 2 Wash. 422 (27 Pac. 812). See, also, *Ah How v. Furth*, 13 Wash. 550 (43 Pac. 639), and *Gilmore v. The H. W. Baker Co.*, 12 Wash. 468 (41 Pac. 124). But it is urged that the evidence detailing the transaction with the deceased was brought out in cross-examination. The record discloses that the answer of the witness, when explained, could not mean anything other than the transaction with the deceased.

Counsel for respondents further maintain that the verdict is correct because the vital issue was the adverse possession of plaintiffs until the statute of limitations had run. While the verdict should be sustained upon the evidence showing adverse possession, there was some conflict upon this issue, and the jury may have found for plaintiffs on the erroneously admitted testimony of the transaction between plaintiffs and the deceased.

Opinion of the Court.—REAVIS, C. J. [30 Wash.

For error in the admission of this testimony, the judgment is reversed, and the case remanded for a new trial.

ANDERS, FULLERTON, HADLEY and MOUNT, JJ., concur.
DUNBAR, J., dissents.

[No. 4804. Decided October 4, 1902.]

W. G. SAYLES, *Appellant*, v. WALLA WALLA COUNTY, *Respondent*.

COUNTIES — COMPENSATION OF SURVEYORS.

County surveyors are entitled to compensation only for the days necessarily occupied in the discharge of the duties of that office, under Laws 1889-90, p. 302, § 2, which provides that "the county surveyor shall also receive \$5 per day for each day actually engaged in his duties as such officer," and under Laws 1895, p. 418, § 30, amendatory of the act of 1890, classifying counties and fixing salaries of officers, which provides that all "officers paid a per diem under the provisions of this act shall only be paid for the time actually and necessarily spent in the discharge of their duties."

STATUTES — DETERMINATION OF VALIDITY.

The validity of a statute will not be determined, except when necessarily involved in the case before the court.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Affirmed.

W. T. Dovell, for appellant.

Oscar Cain, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Plaintiff (appellant) was the county surveyor of Walla Walla county. The complaint alleges that from the first Monday in January, 1899, until the first Monday in June, 1901, he discharged all the duties of such county surveyor which are required by law; that

Oct. 1902.] Opinion of the Court.—REAVIS, C. J.

he is entitled to \$5 per day for each day not a holiday during his term, and demands judgment for the remainder due him for compensation while so discharging his official duties. A general demurrer was interposed to the complaint by defendant. The demurrer was sustained, and, plaintiff declining to plead further, judgment of dismissal was entered.

The objection urged to the complaint is that it does not state a cause of action, because the time actually and necessarily occupied in the discharge of the duties of the surveyor is not stated. The rights of the plaintiff must be determined by the law providing for his compensation. The original statute designating fees and salaries of county officers is found in Laws 1889-90, p. 302. The second section of this act designates the names and number of the county officers, among which are county surveyors, and provides: "the county surveyor shall also receive \$5 per day for each day actually engaged in his duties as such officer." The counties of the state were then graded according to the population, and salaries and fees in each prescribed in §§ 3 to 31, inclusive, and in each section was stated the salary or compensation to be received by each county officer. For counties of the twelfth class, of which Walla Walla was one, in § 14 of the act relating thereto, it was enacted, "county surveyor, \$5 per day." By an act approved March 20, 1895 (Laws 1895, p. 409), the legislature amended the original salary and fee law under the following amendatory title:

"An act to amend sections three to thirty-one, both inclusive, of an act entitled 'An act classifying the counties according to population, enumerating the county officers, fixing the salaries thereof, providing for deputies, collection of fees and payment of salaries,' received by the governor March 26, A. D. 1890."

In this act each of the sections mentioned was amended by repeating the former section as amended. In the amendatory act § 14 of the original law relating to surveyors was not changed, and still reads, "county surveyor, \$5 per day." Section 2 of the original law was left unchanged. It seems then that the surveyor is to receive \$5 per day for each day actually engaged in his duties as such officer. No change in the provisions of § 2 of the original law has been brought to our attention. It is true, § 2 of the original act as it appears in Ballinger's Code, § 1564, does not seem to contain this provision as to the actual services of the surveyor, but it appears in 1 Hill's Code, § 2973. This direction as to the compensation of county surveyor was made generally applicable to all the counties, and it is not inconsistent with the specification of \$5 per day in the classified sections of the law following in the act and relating to each county. Much of the argument of counsel has been directed to the constitutionality of § 30 of the amendatory act of 1895. Laws 1895, p. 418. The section reads as follows:

"All officers paid a per diem under the provisions of this act shall only be paid for the time actually and necessarily spent in the discharge of their duties. No superintendent of common schools shall receive any compensation for his services other than the salary fixed by this act."

It is urged this is an independent section, and not within the title of the amendatory act, and, although germane to the title of the original act, yet the restrictive nature of the amendatory title excludes the amendment of anything in the original law further than §§ 3 to 31, inclusive. However, it is not necessary here to determine the validity of § 30 of the amendatory act. Questions of this nature are decided only when necessarily involved in the case before the court. But it has been seen that § 2 of the orig-

Oct. 1902.] Opinion of the Court.—**ANDERS, J.**

inal law fixes the compensation of surveyors at \$5 per day for each day they are actually engaged in the discharge of their duties as such surveyors. With such construction of the law the facts necessary to state a cause of action are not averred in the complaint.

Judgment affirmed.

ANDERS, FULLERTON, HADLEY, MOUNT and DUNBAR,
JJ., concur.

[No. 4888. Decided October 4, 1902.]

THE STATE OF WASHINGTON on the Relation of *H. Quandt*
v. SUPERIOR COURT OF KING COUNTY, *Boyd J. Tallman,*
Judge.

APPEAL — SUPERSEDEAS — STAYING TEMPORARY INJUNCTION.

The writ of prohibition will not issue to restrain the superior court from fixing the amount of a bond to stay the execution of a temporary mandatory injunction pending appeal, where the injunction was issued upon a hearing by the court after notice given to all parties.

Original Application for Prohibition.

Fred H. Peterson, for relator.

James M. Epler, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The Richelieu Hotel and the Palmer House are adjoining buildings, situate on the east side of Occidental avenue, between Washington street and Main street, in the city of Seattle. When these buildings were constructed, only one wall was erected between them, and each of the respective owners paid one half of the cost

thereof, and also one half of the cost of the hall, stair, and elevator ways, and all rooms over the hall-way space; and they agreed in writing that the said party wall, hall, stair, and elevator ways should be maintained at the expense of the owners in proportion to their interests therein. It appears that the main entrance to these buildings is on Occidental avenue, and that, on the first floor, a hall extends back from the entrance to an elevator, which is in the Richelieu Hotel building, and to a stairway, which is in the Palmer House. It further appears that the said elevator and stairway connect with a hall on the second floor of the buildings which affords ingress and egress to and from the said elevator and stairway for both of the buildings, and that said hall is reached from the Richelieu Hotel through an archway in the wall next to the main portion of said building. One Thomas Winsor is conducting a hotel business in the Richelieu Hotel building, and the German Savings & Loan Society, a corporation, or the relator herein, H. Quandt, as its lessee or agent, is carrying on a like business in the Palmer House. On April 24, 1902, the said Thomas Winsor instituted an action in the equity department of the superior court of King county against the said German Savings & Loan Society and the said H. Quandt, and alleged in his complaint, in substance, among other things, that the said defendants themselves, and by their agents, servants, and employees, had placed at the archway in the hall of the Richelieu Hotel building fire proof shutters, and had from time to time closed and locked the same when there was no fire, and no apprehension of any, and solely for the purpose of preventing the plaintiff and his guests from going to and from his hotel by way of the front entrance, stairway, and elevator above described; that the placing of side shutters upon the said premises was a trespass, and a violation of the said party-

Oct. 1902.] Opinion of the Court.—**ANDERS, J.**

wall agreement; and that the plaintiff had as many as three times taken said shutters down, or unlocked or broken them, but the defendant again replaced and locked the same; that, when these shutters are thus closed and locked, the guests of the Richelieu Hotel are unable to reach said stairway or elevator, and are put to such inconvenience and annoyance thereby that they quit said hotel as guests; that lodgers, and the public generally, wishing to stop at the Richelieu Hotel, are unable, because of these iron shutters, to gain admission to said hotel by the said front entrance; that the plaintiff is constantly sustaining great loss on account of the inability of persons to use the main entrance to his hotel, and has already sustained damages amounting to \$250, and unless he can obtain relief from the court his damage will be irreparable, and that unless the defendants are restrained by the order of court the plaintiff will be without adequate remedy, and will suffer great and irreparable injury. The prayer of the plaintiff is for a writ of injunction restraining and inhibiting the defendants from placing in said hall of said building shutters at the place mentioned, or any obstructions which interfere in any way with the occupants of said Richelieu Hotel in passing to and from said hotel by the main entrance on Occidental avenue, or which will in any way hinder or impede said occupants from reaching said stairway and elevator; that an emergency exists demanding the issuance of a restraining order; and that upon a final hearing the said injunction be made perpetual; and for such other and further relief as may be equitable.

Upon presentation of said complaint and an affidavit, a restraining order was made, restraining and prohibiting the defendants from closing, or in any way keeping closed, the shutters mentioned in the complaint; and the hearing was set for April 28, 1902, to show cause why an injunc-

tion should not issue. On that day, all parties being in court by their attorneys, the plaintiff moved for a mandatory injunction, which, after argument of counsel, was ordered to be issued, commanding the defendant to unlock, and keep open, the shutters in the complaint mentioned; which order, omitting the title and number of the cause, is as follows:

"This cause coming on to be heard, on the order heretofore made on the defendants to show cause; and the defendant, H. Quandt, having asked for a continuance of the hearing; and it appearing to the court that the hallway in the complaint mentioned is obstructed by the shutters in said complaint, it is therefore ordered that said defendant Quandt unlock and open said shutters, or take the same down, immediately upon the service of this order, and, in the event that said Quandt cannot be found, that then the plaintiff be authorized to unlock and open said shutters, or to remove the same."

On April 30, 1902, the defendant Quandt demurred to the complaint, and the court sustained the demurrer. On May 6, 1902, the defendant Quandt moved to dismiss the complaint, and the plaintiff, on the 10th day of that month, asked and obtained leave to file a supplemental complaint. The defendant Quandt demurred to the supplemental complaint, which demurrer was sustained, and the plaintiff thereupon, by leave of the court, filed an amended supplemental complaint. A demurrer to this complaint was also sustained, and the action dismissed on June 14, 1902, and the plaintiff thereupon appealed. Thereafter, and on June 17, 1902, the plaintiff requested the court to fix the amount of the bond to be given by plaintiff to keep in force the injunction theretofore issued, which the court was disposed to do; and to prevent such action on the part of said superior court, and the judge thereof, the defendant Quandt applied for and obtained from this court an alternative

Oct. 1902.] Opinion of the Court.—**ANDEES, J.**

writ of prohibition, commanding the Hon. Boyd J. Tallman, as judge of said court, to desist and refrain from any further proceedings in the matter of granting an order fixing the amount of a supersedeas bond in said action on appeal, for the purpose of continuing in force and effect the said restraining order (so-called in said writ) and approving a bond therein for that purpose, until the 25th day of June, 1902, and until the further order of this court, and to show cause before this court at the court room in the city of Olympia, at the hour of 10 o'clock a. m. of said last mentioned day, why he should not be absolutely restrained and prohibited from any further proceedings in such suit or matter.

On the day specified in said writ, the said judge filed his return thereto, setting forth therein the proceedings had and taken in the said original action, and which we have hereinbefore mentioned, and asked that the prayer of the relator be denied. It is here contended, on the part of the relator, that the order of the court directing the relator herein to "unlock and open said shutter, or take the same down, immediately upon the service of this order," cannot legally be continued in force during the pendency of the appeal, and that the judge of the superior court has no right or authority of law to approve or fix the amount of a bond for such purpose. A contrary view is entertained by the respondent, and in his behalf it is urged that our statute affords full and complete authority for the contemplated action, on the part of the respondent, which the relator now seeks to prohibit. We think the respondent's interpretation of the law is the correct one, in view of the facts disclosed by the record. It is true, this court held in *State ex rel. Miller v. Lichtenberg*, 4 Wash. 407 (30 Pac. 716), and in *Coleman v. Columbia & P. S. R. R. Co.*, 8 Wash. 227 (35 Pac. 1077), that a restraining order, under the

statute therein referred to, issued without notice to the defendants, on the ground of a temporary emergency, cannot be kept in force by plaintiff during the pendency of an appeal. But the order of the learned judge of April 28, 1902, as above set forth, is something more than a mere restraining order issued without notice to the defendants on the ground of a temporary emergency, and, therefore, the cases above mentioned are not applicable here. It was evidently considered by the judge who made it, and rightly so, we think, as a temporary mandatory injunction. It was issued after notice to all parties, and a hearing by the court, and, in our opinion, it is just such a "temporary injunction" as may properly continue in force during the pendency of an appeal, under § 6507, Bal. Code (Laws 1893, pp. 123-4), which provides as follows:

"In all cases where a final judgment shall be rendered by any superior court of this state in a cause wherein a temporary injunction has been granted, and the party at whose instance such injunction was granted shall appeal from such judgment, such injunction shall remain in force during the pendency of such appeal, if, within five days after service on him of notice of the entry of the final judgment, such appellant shall file with the clerk of the superior court a bond, with one or more sufficient sureties, in a penalty to be fixed by said court, conditioned that the appellant shall pay to the respondent all costs and damages that may be adjudged against the appellant on the appeal, and all costs and damages that may accrue to the respondent by reason of the injunction remaining in force."

Manifestly, the judgment appealed from by Mr. Winsor was a final judgment, and, inasmuch as the temporary injunction in question was granted at his instance, it seems quite clear to us that he has the right, under the above quoted provision of the statute, to file a bond with sufficient sureties in a penalty fixed by the court, and thereby con-

Oct. 1902.]

Opinion Per Curiam.

tinue in force and effect such injunction during the pendency of his appeal; and, that being so, it follows that the peremptory writ of prohibition should be denied, and the petition discharged, at the cost of the relator, and it is so ordered.

REAVIS, C. J., and FULLERTON, HADLEY, MOUNT,
WHITE and DUNBAR, JJ., concur.

[No. 4884. Decided October 7, 1902.]

LILLIE L. BACHELOR, *Respondent*, v. JAMES BACHELOR,
Appellant.

DIVORCE — SUIT MONEY ON APPEAL — REFUSAL TO ORDER PAYMENT.

In an action for divorce the husband will not be required to pay suit money to the wife to enable her to conduct her case on appeal, where it is apparent from the showing made that such an order for the payment of suit money would be futile and vain by reason of the husband's inability to comply therewith.

Appeal from Superior Court, King County.—Hon.
BOYD J. TALLMAN, Judge.

Governor Teats and E. W. Taylor, for appellant.

PER CURIAM.—Motion in a divorce suit by plaintiff, the wife, to require the defendant, the husband, to pay suit money to plaintiff to enable her to conduct her case in this court. It appears from plaintiff's affidavit that at her suit, as plaintiff, the superior court of King county granted her a decree of divorce from the defendant; that the defendant has appealed therefrom to this court, and the plaintiff is without money or means to properly present her case on appeal. The affidavit shows that in the trial of the case in the superior court that court made several orders requiring

defendant to pay suit money and alimony to plaintiff, and made several efforts to enforce payment thereof by appropriate process; that defendant had not paid any of such suit money or alimony. The plaintiff does not, in her affidavit here, allege or show the ability of defendant to pay any suit money. Affidavits are presented on behalf of the defendant showing that he is a carpenter by occupation; that he has himself and two children to support; that he has no available means from which any money can be derived; that he is now, and may for an indefinite time be, unable to perform any labor, on account of injuries to his right arm sustained while at work, and which arm is necessary to use while working. Conceding that this court has power to make such an order, which is not here decided, upon the facts it is apparent that any order for the payment of suit money would be futile and vain. For this reason the motion is denied.

DUNBAR, J., dissents.

[No. 4227. Decided October 9, 1902.]

MONA GERTRUDE LOUGH, *Appellant*, v. JOHN DAVIS &
COMPANY, *Respondent*.

APPEAL — WHEN LIES — JUDGMENT AGAINST ONE OF SEVERAL DEFENDANTS.

An order sustaining a demurrer to a complaint interposed by one of several defendants is appealable, although there has been no disposition of the case so far as another defendant is concerned, when the latter had never been served nor appeared in the action (*Keef v. Tibbals*, 18 Wash. 656, followed).

AGENTS — NONFEASANCE — LIABILITY TO THIRD PERSON.

An agent who is put in charge of property by the owner, with sole and absolute control and management thereof, and full power

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Oct. 1902.] Opinion of the Court.—DUNBAR, J.

to rent, repair, and keep same in safe condition for tenants, is liable for injuries resulting because of a failure to keep such premises in repair; there being no distinction, as regards an agent's liability, whether the injuries flow from his nonfeasance or misfeasance.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

Frederick R. Burch and *Robert H. Lindsay*, for appellant.

Charles F. Munday, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an action against an agent, who was authorized to rent and repair the tenement house described in the complaint, for permitting the house to become unsafe for want of repairs, from which cause the plaintiff was injured. Paragraph 2 of the complaint is as follows:

“That at all said times and for a long time before, the above named defendant, Sheldon R. Webb, has been and still is the owner of that certain real property known as lots 8 and 9, in block 38, of A. A. Denny's Addition to the City of Seattle, and of the buildings thereon situated, and that the above named defendant, John Davis & Co., has had, and still has, sole and absolute control and management of said real property as the servant and agent of said Sheldon R. Webb, with full power, authority and direction from their said principal to rent and repair the same, and to keep the same in repair and safe condition for tenants.”

The other pertinent allegations are to the effect that a wide veranda, extending along two sides of the building about fifteen feet from the ground, was used in common by all of the tenants, and was inclosed by a railing; that the railing was allowed to become old, rotten, and unsafe

Opinion of the Court.—DUNBAR, J.

[30 Wash.]

through the negligence of the defendants, and that, while the plaintiff was playing on said veranda, by reason of the unsafe condition, the railing gave way, and she fell from said veranda from a height of fifteen feet and more from the ground, and was injured, etc. To this complaint the defendant John Davis & Co. interposed a demurrer on the ground that it did not state facts sufficient to constitute a cause of action against it, the demurring defendant. There was no appearance by Sheldon R. Webb. The demurrer was sustained, and the plaintiff electing to stand on her complaint, judgment was entered on the demurrer. From such judgment sustaining the demurrer this appeal was taken.

The respondent has interposed a motion to dismiss the appeal for the reasons: (1) That the judgment appealed from is not a final judgment; (2) because no final judgment has been entered in this action; (3) because this court has no jurisdiction to hear and determine this action upon the attempted appeal herein. The idea embraced in all these assignments is that the judgment is not final, because there has been no disposition of the case so far as one of the defendants, Sheldon R. Webb, is concerned. Many authorities are cited, but we will notice only those from this court. *Freeman v. Ambrose*, 12 Wash. 1 (40 Pac. 381), simply decided that an order setting aside a default and vacating judgment thereon was not appealable. *Nelson v. Denny*, 26 Wash. 327 (67 Pac. 78), is simply an affirmation of the doctrine announced in that case. In *Johnson v. Lighthouse*, 8 Wash. 32 (35 Pac. 403), the appeal was dismissed because the Pacific Loan & Trust Investment Company was not served with notice of appeal; but in that case the said company had appeared in the action and filed a demurrer to the complaint. *Fairfield v. Binnian*, 13 Wash. 1 (42 Pac. 632), was a case where

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

a notice of appeal had not been given to a party who had appeared in the court below by intervention, and it was held that he was as much a party in interest as the parties who originally appeared in the action, and was entitled to a notice of appeal from any judgment upon issues raised by the original parties. These cases hardly seem to us to be in point on the questions involved here. In this case Sheldon R. Webb never had become a party to the action, never had appeared in the action, nor been served with notice, and the case falls squarely within *Keef v. Tibbals*, 18 Wash. 656 (52 Pac. 227), where it was held that, where a complaint has been filed against several defendants, and before service has been obtained against all of them the complaint has been stricken on motion of those served, an appeal lies from such order striking the complaint, although there has been no dismissal or other action taken with reference to the defendants not served. The motion to dismiss will be denied.

It is the contention of the respondent that the law is well settled that for a misfeasance the agent is personally liable, but that he is never liable for a mere nonfeasance; and that, the respondent being charged only with a nonfeasance or neglect to do its duty, and not with any misfeasance or act which it ought not to do, the complaint on its face shows that it is not liable, and that the demurrer was therefore properly sustained. This rule is announced by some of the law writers and many of the courts. One of the leading cases sustaining this doctrine is *Delaney v. Rochereau*, 34 La. An. 1123 (44 Am. Rep. 456), where it was held that under the doctrine of both the common and civil law agents are not liable to third persons for nonfeasance or mere omissions of duty, being responsible to such parties only for the actual commission of those positive wrongs for which they would be otherwise accountable in

their individual capacity under obligations common to all men. In this case a balcony which needed repairs fell, fatally injuring the plaintiff; and, while the agent was not responsible for the injured party's being in the house at that particular time,—he having obtained entrance by means of a key obtained from some one else,—the case is discussed and the judgment based upon the doctrine above announced. This is also the established doctrine in New York. The case of *Carey v. Rochereau*, 16 Fed. 87, is a Louisiana case, and bases its decision on *Delaney v. Rochereau, supra*, without discussion. *Labadie v. Hawley*, 61 Tex. 177 (48 Am. Rep. 278), held, in accordance with the same rule, that an agent renting his principal's house with authority to construct a cooking range was not liable for injury to an adjoining proprietor, caused by the use of the range; citing Story on Agency, 309, and other authorities. In *Feltus v. Swan*, 62 Miss. 415, it was held that an agent in charge of a plantation was not liable to the owner of an adjoining plantation for damage resulting from the malicious neglect and refusal of the agent to keep open a drain which it was his duty as such agent to keep open. The announcement of this doctrine is accredited by many of the courts indorsing it to the opinion in *Lane v. Cotton*, 12 Mod. 472, but it was, as a matter of fact, announced only incidentally in that case in a dissenting opinion. The question of the responsibility of the agent could not have been before that court, for the action was against a postmaster for the loss of a letter which was taken from the mail by a clerk, and it was only the responsibility of the master, and not that of the servant or agent, which was under discussion.

The reason assigned to sustain this rule is that the responsibility must arise from some express or implied obligations between the particular parties standing in privity

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

of law or contract with each other. If this be true, it is difficult to see what difference there is in the obligation to their principal between the commission of an act by the agents which they are bound to their principal not to do and the omission of an act which they have obligated themselves to their principal to do. They certainly stand in privity of law or contract with their principal exactly as much in the one instance as in the other, for the obligation to do what ought to be done is no more strongly implied in the ordinary contract of agency than is the obligation not to do what ought not to be done. This reason for the rule not being tenable, and no other reason being obvious, the rule itself ought not to obtain; for jurisprudence does not concern itself with such attenuated refinements. It rests upon broad and comprehensive principles in its attempt to promote rights and redress wrongs. If it takes note of a distinction, such distinction will be a practical one, founded on a difference in principle, and not a distinction without a difference; and there can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operation, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. There is certainly no difference in moral responsibility; there should be none in legal responsibility. Of course, if the omission of the act or the nonfeasance does not involve a non-performance of duty, then the responsibility would not attach. If it does involve a non-performance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. Such practice is less circuitous than that which necessitates first

the suing of the master by the party injured, and then a suit by the master against the servant to recoup the damages.

But the honorable judge who wrote the opinion in *Delaney v. Rochereau, supra*, was mistaken in his announcement that the civil law indorsed the distinction upon which his decision was based, for, while the doctrine is stated in the Justinian Code that no man could usually be made liable for a mere omission to act, it was otherwise when the omission to act involved a negligence of duty. Domat argues that, as an agent is at liberty not to accept the order and power which are given him, so he is bound, if he does accept the order, to execute it; and, if he fail to do so, he will be liable for the damages which he shall have occasioned by his not acting. Under the Aquilian law the distinction between omission and commission was not recognized under such circumstances. In the ninth digest of the Aquilian law the following instance is given: One servant lights a fire, and leaves it to another. The latter neglects to check the fire at the proper time and place, and a villa is burned. The first servant was charged with no negligence, because it was his duty to light the fire, and it is argued, very sensibly, that, if the second could not be charged because not putting out the fire was simply an omission of duty, there would be a miscarriage of justice. Is the keeper of a draw-bridge, whose duty it is to close the draw after a ship passes through, and who negligently fails to perform that duty, allowing a car loaded with passengers to be hurled into the river below, to escape responsibility to the injured, while the man who attempts to operate it, but, in so attempting, operates it negligently and unskillfully, is held responsible? Instances in the ordinary transactions of life might be multiplied almost without end,

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

the very statement of which shows conclusively the fallacy of the rule.

The attempt by the courts to maintain this indistinguishable distinction has led to many inconsistent decisions. Thus, in *Albro v. Jaquith*, 4 Gray, 99 (64 Am. Dec. 56), the plaintiff was not allowed to recover of the superintendent of a canal company for damages caused by negligence in the management of the apparatus used for the purpose of generating, containing and burning inflammable gas; the superintendent being the agent of the company, and being charged with carelessly, negligently, and unskillfully managing the business. It was held that he was not charged with any direct act of misfeasance, but only with nonfeasance, and that there was no redress, because, as the court said, the obligation to be faithful and diligent was founded in an express contract with his principal. As we have before indicated, this would be equally true of the acts of commission or misfeasance in his stewardship. But in *Bell v. Josselyn*, 3 Gray, 309 (63 Am. Dec. 741), also a Massachusetts case, and decided the same year, it was held that an agent who negligently directed water to be admitted to a water pipe was liable to a third person, because such action was misfeasance. In that case it was not claimed that the admission of water to the pipe was negligent or wrongful, but the negligent act or omission was in allowing the pipe to become obstructed,—certainly as pure an omission or nonfeasance as could be conceived of. But the court, in order to maintain the distinction which it deemed itself bound by precedent to do, virtually obliterated the distinction by the following circuitous reasoning:

“The defendant’s omission to examine the state of the pipes in the house, before causing the water to be let on, was a nonfeasance. But if he had not caused the water to be

let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts are, the nonfeasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of it being preceded by a nonfeasance."

Much more cogent and judicial is the reasoning of the same court many years after in *Osborne v. Morgan*, 130 Mass. 102 (39 Am. Rep. 437), where an agent of premises was held responsible to a third person for suffering to remain suspended from a room a tackle block, which fell upon and injured the plaintiff. The court, speaking through Chief Justice GRAY, said:

"The principal reason assigned was that no misfeasance or positive act of wrong was charged, and that for nonfeasance, which was merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer, an agent or servant was responsible to him only, and not to any third person. It is often said in the books, that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

not nonfeasance, or doing nothing; but it is misfeasance, doing improperly."

There is still another class of cases which hold what seems to us to be the correct doctrine, viz., that the obligation, whether for misfeasance or nonfeasance, does not rest in contract at all, but is a common-law obligation devolving upon every responsible person to so use that which he controls as not to injure another, whether he is in the operation of his own property as principal or in the operation of the property of another as agent. One of the leading cases maintaining this view is *Baird v. Shipman*, a case decided in 1890, and reported in 132 Ill. 16 (23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504). There it was held that an agent who has complete control of a house belonging to an absent principal, and who lets the house in a dangerous condition, promising to repair it, is responsible to the third person injured by an accident caused by want of such repair. There is nothing to distinguish this case from the case at bar excepting the promise to repair, and that does not seem to have been deemed by the court an important feature; but the case was decided upon the broad principle above announced. Said the court:

"It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable. . . . If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts," citing approvingly *Osborne v. Morgan, supra*.

To the same effect is *Mayer v. Thompson-Hutchison*

Bldg. Co., 104 Ala. 611 (28 L. R. A. 433, 53 Am. St. Rep. 88, 16 South. 620). The court there, after noticing the doctrine that the agent can be held liable to third persons for misfeasance only, says:

"It is difficult to apply the same principles which govern in matters of contract between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or nonfeasance, or to give a sound reason why a person who, while acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty, because he was acting as servant or agent. The tort is none the less a tort to the third person, whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury."

In that case *Baird v. Shipman, supra*, is cited approvingly, with the remark that the rule laid down in that case is the better rule. So, in *Ellis v. McNaughton*, 76 Mich. 237 (42 N. W. 1113, 15 Am. St. Rep. 308), it was held that an agent who had entire control of premises was liable for injuries resulting from the removal of a walk on the premises by one of his employees, contrary to his orders, if, after such removal, he knew of the dangerous condition of the premises, and allowed them to remain in that condition. It would seem that, if there is anything in definitions, this was a pure nonfeasance, and yet the court, in trying to harmonize the distinction with the general rule announced and above discussed, said, speaking of the agent's duty in relation to the work:

"Every day it was so permitted to remain, when the defendant had the entire control of it, and the authority without question to replace it, was a wrong and a misfeasance."

It is also said that, irrespective of his principal, the agent was bound while doing the work to so use the

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

premises, including the sidewalk, as not to injure others. Misfeasance, said the court, may involve the omission to do something which ought to be done,—as when an agent engaged in the performance of his undertaking omits to do something which it is his duty to do under the circumstances, as when he does not exercise that degree of care which due regard for the rights of others required. To the same effect, *Campbell v. Portland Sugar Co.*, 62 Me. 552 (16 Am. Rep. 503). In *Lottman v. Barnett*, 62 Mo. 159, it was held that one having the general charge and superintendence of the construction of a building was responsible for the killing of a workman caused by the falling of a wall, which resulted from the giving way of supports on which the wall rested under the working of a jackscrew, although the appliance was put to work under the immediate direction of another person, employed by the owner of the building, and while the architect was absent, where it appeared that the manager of the jackscrew was employed under the advice of the architect, and subject to his discretion, and that he knew and approved of the method adopted for effecting the raising. Whether the wall fell because the plan for raising it was a bad one, or because the supports were inadequate, it was held that in either case the disaster was attributable to positive misfeasance for negligence in a work which the architect had undertaken, but in which he failed to exhibit the care and skill which the law imposed upon him. To make this distinction more shadowy, if possible, Mr. Mechem, in his work on *Agency*, § 572, after announcing the general rule, says:

“Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some duty, which he

owed to his principal and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing, as where the agent while engaged in the performance of his undertaking does not do something which it was his duty to do under the circumstances,—does not take the precaution, does not exercise that care,—which a due regard for the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not-doing which constitutes actionable negligence in any relation."

The author then quotes approvingly the language of Chief Justice GRAY, in *Osborne v. Morgan*, *supra*, and of Judge METCALF in *Bell v. Josselyn*, *supra*, so that it will be seen that, even according to Mr. Mechem, a lack of care and a lack of precaution, when once the duty is assumed, are as much misfeasance as an active misdoing. The irresistible logic of his statement is that the agent is responsible to third persons when he is negligent in the performance of the duties which he undertakes, whether such act be termed misfeasance or nonfeasance. The rule is thus announced in 1 Am. & Eng. Enc. Law, p. 407:

"Where a principal engages an agent to do a certain work and to take entire control over it, while the principal does not interfere, but leaves it entirely with the agent, the agent and not the principal will be liable to third parties for injuries or damages sustained by the negligence or unskillful manner in which the work is done."

The question of whether or not the principal is liable is not under discussion here. In the same section, and in another paragraph, that author announces that an agent is, in general, not liable to third parties for acts of negligence for non-performance of duty; that as such he is only responsible to the principal, and the principal to the third

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

party. So that in the mind of the author the distinction must have been established between an agent that did not have complete or entire control and one who did. There is no other way of harmonizing the two statements. This is, in effect, the same rule enunciated by Mr. Wharton in his work on *Agency*, § 538. Under the announcement that "wherever there is liberty there is liability," it is said:

"Hence, to strike at the general principle that lies at the basis of the adjudications we have just noticed, wherever the agent is at liberty to choose his own mode of action, then he is distinctively liable in damages, if by such mode of action he invades another's rights."

The same doctrine is announced in § 537, where it is said:

"Where an agent, who has general liberty of action, injures a third person, there the agent is personally liable for negligent as well as for malicious acts."

The author here discriminates between an agent and a servant, holding that a servant is a part of the machinery by which the master works, and there is no emancipation or liberty of action; but that this reasoning does not apply to agents who have complete control, and therefore perfect liberty of action. Doubtless much of the mist and fog which have enveloped the decisions on this subject are due to confusing the omission of an act which one is not bound to perform with the imperfect performance of an act to which he is bound. In other words, whoever undertakes a duty, and is clothed with authority to perform that duty, is responsible to the party injured for negligent imperfection in the discharge of such duty, on the broad doctrine announced above that he is obligated in transacting business to so transact it that his neighbor shall not thereby be injured; but there is no liability for the non-performance of a duty not assumed, or not independently controlled. But

for neither the non-performance nor the malperformance of a positive duty can one escape responsibility, whether that duty is imposed by contract or by general obligation, for under any and all circumstances it is the essence of negligence to omit to do something which ought to be done. While some detached expressions of Mr. Wharton have been quoted in support of the distinction contended for by the respondent, that author puts the question at rest in his work on the Law of Negligence (2d ed.), § 535, where he says:

"The mere fact that I am the agent, in doing the injurious act, of another, does not relieve me from liability to third persons for hurt this act inflicts on them. Judge Story, indeed, tells us that for *omissions* of the agent the principal alone is liable, while for misfeasances the agent is also liable; but this distinction, as has been already shown, can no longer be sustained. The true doctrine is, that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such thing, though the hurt is remotely due to the agent's negligence; the reason being that the causal relation between the agent and the person hurt is broken by the interposition of the principal as a distinct center of legal responsibilities and duties. But wherever there is no such interruption of causal connection; in other words, wherever the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury, then such stranger can recover from the agent damages for the injury."

There is some contention in respondent's brief on the alleged barrenness of the allegations of the complaint, but we think the allegations were ample to show that the respondent was authorized to keep the building in repair; that it undertook that office or duty, and was in complete control of the work. It is alleged that it was in absolute control and management, with full power, authority, and

Oct. 1902.]

Syllabus.

direction to repair, and to allege that it agreed to do so would only be to allege the agreement to do the duty which the law imposed upon it after it had assumed the control and management which is alleged.

Our conclusion is that the complaint states a cause of action against the respondent. The judgment is therefore reversed, with instructions to the lower court to overrule the demurrer to the complaint.

REAVIS, C. J., and ANDERS, MOUNT and FULLERTON, JJ., concur.

[No. 4289. Decided October 15, 1902.]

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THE STATE OF WASHINGTON *on the Relation of Charles B. Smith v. Superior Court of King County, Arthur E. Griffin, Judge.*

CERTIORARI — WHEN LIES — ABSENCE OF REMEDY BY APPEAL.

Certiorari will lie for the review of the judgment of the superior court determining the question of public use and necessity in proceedings for the appropriation of private property, in the absence of a statute permitting appeal from an adjudication upon that question.

EMINENT DOMAIN — ELECTRIC RAILWAY COMPANIES.

Under Laws 1899, p. 147, granting electric railway corporations the power of eminent domain, such corporations are thereby vested with legal capacity to prosecute proceedings for the appropriation of private property.

SAME — SUFFICIENCY OF PETITION.

Condemnation proceedings for the appropriation of a portion of a dedicated street for electric railway purposes are warranted, although Laws 1901, p. 147, § 1, forbid the exercise of such power with respect to public roads or streets, when it appears from the petition therefor that the street in question lay upon tidelands and was constantly washed by the rise and fall of the tides;

that it had never been used as a street but had merely been platted and dedicated for that purpose; that it could not be so used without filling in or the construction of an elevated trestle or bridge; that the city had authorized an electric railway to be constructed in such street on condition that the holder of the franchise would construct a trestle and roadway for the use of teams as well as for its cars; and that the company was seeking, in compliance with the ordinance of the city, rather to make a street where none existed before instead of being chargeable with the appropriation of a street.

SAME — APPROPRIATION OF EASEMENTS.

The construction of a trestle or bridge in a street constitutes an appropriation of an adjoining lot owner's easements of light, air and access, for which he is entitled to just compensation to be ascertained by a jury.

Original Application for Certiorari.

Moore & Farrell, for relator.

Piles, Donworth & Howe, for respondent.

The opinion of the court was delivered by

ANDERS, J.—This is an original application to this court for a writ of certiorari to review a judgment of the superior court of King county in a condemnation proceeding instituted by the Seattle Electric Company. It appears from the record that the relator, Charles B. Smith, is the owner of lots 5 and 6, except the west 27 feet thereof, and lots 1, 2, 7, and 8 of block 21, of D. S. Maynard's plat of the town (now city) of Seattle, and that these lots abut upon Fourth avenue South, a dedicated and platted street of said city. This avenue has never been improved, and cannot be used for the purposes of a public street in front of the relator's lots, by reason of the fact that it is there merely a vacant strip of tide land, 66 feet in width, over which the tide regularly and freely ebbs and flows. The Seattle Electric Company is a corporation authorized by law to construct and operate electric and other railroads in the state of

Oct. 1902.] Opinion of the Court.—ANDEES, J.

Washington. This corporation is engaged in the construction of a street railway in said Fourth avenue South, under and in pursuance of ordinance 7015 of said city. When the construction of the company's line of railway had reached that portion of the street lying adjacent to the relator's lots, he applied for and obtained a restraining order in an action brought by him in the superior court against the company for an injunction. At the hearing of this application for a temporary injunction the superior court made an order denying such injunction on condition that the company give a bond in the full amount of the damages which he claimed he would sustain by the building of the railway in front of his premises. The required bond was given, and the company was about to continue its work upon the street, when the relator herein applied to this court for a writ of certiorari, which was granted on the ground that a bond was not proper in such cases, as, under the constitution of the state, private property may not be taken or damaged for public or private use without first making just compensation therefor to the owner. *State ex rel. Smith v. Superior Court*, 26 Wash. 278 (66 Pac. 385).

Thereafter the company, on December 20, 1901, instituted a proceeding under the statute relating to eminent domain for the purpose of ascertaining the amount of compensation that should be made to the relator herein on account of the building of the railway line and roadway which the company was constructing, and which the city required it to construct, in accordance with the provisions of ordinance 7015. The Tucker-Hanford Company was made a party to the condemnation proceeding for the reason that it owns a part of lots 5 and 6, above described; but it has not contested the condemnation, and is not a party to this application for certiorari. A hearing was had in the superior court, after notice to all parties interested, on

the company's petition, and that court found that all the provisions of the statute had been complied with by the petitioner, and concluded and adjudged that the contemplated use for which the trestle and bridge is proposed to be constructed is really a public use, that the public interest requires the prosecution of the enterprise, and that the property and easements sought to be appropriated and injuriously affected by the construction and maintenance of the trestle and bridge are required and necessary for the purposes of the enterprise. After filing its findings of facts and conclusions of law and entering the judgment, as above set forth, the court then ordered a jury to be summoned to determine the amount of compensation to be paid to the owners of the premises for the taking and injuriously affecting said premises and easements by the petitioner, for the purposes of the said enterprise, irrespective of any benefit from any improvement proposed by the petitioner in that proceeding. From this order the relator appealed, and asked the superior court to stay the proceedings until his appeal could be heard in this court, which was accordingly done. Thereupon the petitioner, the Seattle Electric Company, applied to this court for a writ of mandate in the nature of a *procedendo* commanding the superior court to proceed with the trial of the case before a jury to determine the amount of damages, which application was granted, after a hearing of all parties, and the writ issued as prayed for. This court, in that proceeding, decided that there is no statute in this state authorizing an appeal from the judgment of the superior court upon the question of public use and necessity in a condemnation proceeding, the act of 1901 (Laws 1901, p. 213) purporting to authorize such appeal being unconstitutional and void. See *State ex rel. Seattle Electric Co. v. Superior Court*, 28 Wash. 317 (68 Pac. 957).

Oct. 1902.] Opinion of the Court.—ANDERS, J.

Before the hearing was had on the petition for condemnation, the relator herein, respondent there, demurred to the petition on the grounds: (1) That said superior court had no jurisdiction of the particular subject-matter of the proceeding; (2) that the petitioner had no legal capacity to prosecute or maintain said proceeding, and (3) that the petition did not state facts sufficient to constitute a cause of action, or to entitle it to any relief. This demurrer was overruled, and an exception noted. The relator, Smith, now seeks by certiorari to review the action of the superior court in overruling the demurrer to the petition of the Seattle Electric Company, and in entering the interlocutory judgment declaring the public use and necessity, and ordering a jury to assess the damages; and he alleges that the court erred in overruling the demurrer and entering the judgment and order above specified. The respondent moves to quash the alternative writ heretofore issued and dismiss the proceeding for certiorari, or, if it be entertained, that the order of the superior court be affirmed.

It is insisted on behalf of the respondent that, inasmuch as there is no statute providing for an appeal from the judgment of the superior court determining the question of public use and necessity, the constitutional and statutory provisions are sufficiently complied with if that question is judicially determined by the superior court, and that such determination may not be reviewed by certiorari. But this same point was made in the recent case of *Seattle & M. Ry. Co. v. Bellingham Bay & E. R. R. Co.*, 29 Wash. 491 (69 Pac. 1107), and was there decided adversely to the contention of the respondent after a careful consideration by this court. In that case the superior court adjudged that the use for which the property in question was sought to be condemned was a public use, and that the public interest required the prosecution of the enterprise, and the respond-

ent in that proceeding applied to this court for a writ of certiorari to review the judgment of the superior court. The petition for the writ was demurred to for the alleged reasons that this court had no jurisdiction to issue the writ, and that the application did not state facts sufficient to constitute a cause of action. After quoting § 16 of article 1 of our constitution, which defines and limits the right of eminent domain, and § 4 of article 4, defining the jurisdiction of the supreme court, and reviewing its former decisions bearing upon the questions under consideration, this court observed :

“It having been adjudged that no review on appeal of the question of public use and interest involved in the exercise of eminent domain proceedings now exists, it follows that the writ of certiorari may be issued to bring up the record for review in the proceedings for appropriation of the right of way through petitioner’s real property. The application for the writ states sufficient cause for its issuance.”

That case is directly in point here, and is decisive of the question of the power and authority of this court to review the decision of the superior court in condemnation proceedings upon the subject of public use and necessity. It appears clear to us that the petition for condemnation stated sufficient facts to constitute a cause of action, as it alleged all the facts required by the statute to be stated in such proceedings. And it is equally clear that the superior court had jurisdiction of the particular subject-matter of the proceedings, and that the petitioner therein was vested with legal capacity to prosecute said proceeding. In the year 1899 the power of eminent domain was granted to electric railway corporations by an act of the legislature. Laws 1899, p. 147. But a proviso in § 1 of said act declares “that said right of eminent domain shall not be ex-

Oct. 1902.] Opinion of the Court.—**ANDEES, J.**

ercised with respect to any residence or business structure or structures, public road or street"; and it is claimed by the learned counsel for the relator that the Seattle Electric Company is endeavoring to appropriate a public street for the purposes of its railway, in contravention of the above quoted provision of the statute; or that it is at least undertaking to build an elevated railway in a public street of the city, which it has no right to do, in the absence of direct legislative sanction. But we do not think that the company is either attempting to condemn and appropriate to its own use a street, or to construct an "elevated railroad" on a street, within the meaning of the phrase, as understood in localities where such railways are in common use. An elevated railroad, properly speaking, is one which is placed above the surface of the street which is used by the general public; but such is not the character of the structure which the company is required by the city to erect. Fourth avenue South, at the point in question, is a street in name only, and it became such, as we have said, by the mere act of dedication. It can never be used by the public as a street until it is filled in or planked over at an elevation above the rise of the tides. The city, by ordinance, granted to the electric company the privilege of laying its tracks in this platted and dedicated street,—as it was clearly empowered to do by law,—but it required the company, as compensation for such privilege, to construct a plank roadway or bridge (designated in the record as a "trestle and bridge") not less than 22 feet in width, and upon a grade and at a height specified in the ordinance, and to maintain the same for the use of the public as a street as well as for its railroad tracks. It appears from the findings of fact made by the lower court that the natural surface of the ground in Fourth avenue South in front of the relator's lots is 33½ feet below the

present grade of Jackson street, the nearest traveled street, and could not be traveled either by pedestrians or teams; that there is now no roadway or structure of any kind in that part of said avenue; and that the city of Seattle has never established any grade for said avenue in those portions of said avenue which are to be occupied by said trestle and bridge, or taken any steps for the construction of a roadway therein, except by the passage of said ordinance No. 7015. And it would seem, from the record in this case, that what the company is really seeking to do, and what the city requires it to do, under its franchise, is, not to condemn and appropriate a street, but virtually to make a street where none has heretofore existed. It is claimed, however, by the relator that no necessity for taking or injuring his property was shown by the company in the superior court. But that question was determined by the court, in the light of the evidence adduced by the respective parties, in favor of the company, and we see no reason for disturbing its judgment. The electric company does not seek to appropriate the *corpus* of the relator's property, but it is claimed that relator's easements of light, air, and access will be injuriously affected by the building of the proposed structure. Such easements are property, and cannot be taken for public use "without just compensation having been first made, or paid into court for the owner;" but the amount of such compensation must be ascertained by a jury, unless a jury be waived, in the manner provided by law.

The order and judgment is affirmed, at the cost of the relator.

REAVIS, C. J., and DUNBAR, FULLETON and MOUNT, JJ., concur.

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

[No. 4896. Decided October 18, 1902.]

**F. CHEVALIER & Co., Respondent, v. J. H. WILSON,
Appellant.**

APPEAL — AFFIDAVITS — REVIEW.

On appeal from an order overruling a motion to vacate a judgment, affidavits in support thereof will not be considered, when not incorporated in the record by bill of exceptions or statement of facts.

SAME — INCLUSION IN RECORD BY DIRECT REFERENCE IN ORDER OF COURT.

The fact that the order of the court in overruling a motion to vacate a judgment recites that the court has examined the affidavits and briefs furnished by the respective parties and duly considered the same, is not a sufficient identification of affidavits submitted for consideration on appeal, nor does it appear from such recital that the affidavits brought up were all the affidavits presented to the lower court and upon which it based its decision. (*State v. Vance*. 29 Wash. 435 distinguished).

Appeal from Superior Court, Mason County.—Hon. MASON LEWIN, Judge. Affirmed.

W. I. Agnew and J. W. Robinson, for appellant.

H. S. Tremper, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This appeal is from an order of the superior court of Mason county overruling a motion to vacate a judgment, set aside a sale which had been made thereunder, and dismiss the action. The respondent interposes a motion to strike from the records and transcript certain affidavits and certified copies of articles of incorporation appearing therein, and moves for an order affirming the order and judgment of the court appealed from, for the reason that the assignments of error sought to be reviewed by the appeal herein and discussed in appellant's brief are

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38	246
38	291
38	322
30	227
34	112
35	538
30	227
38	608
30	227
40	189
30	227
42	437

based solely and wholly on evidence submitted to the lower court by affidavits and papers at the time of the hearing of the motion upon which such order was based, and that such alleged evidence is not properly before this court for consideration for the reason that said order was based wholly upon evidence, and that said evidence was never settled by the trial court by bill of exceptions or statement of facts, has never been authenticated in any manner by the lower court, and does not, in law, constitute any part of the transcript or record herein. This motion must be sustained. The record does not contain any certification or settlement of a statement of facts or bill of exceptions. The only certificate furnished by the judge is as follows:

“This cause coming on regularly for hearing upon defendant's motion for an order setting aside and annulling the execution levy and sale in this cause, setting aside and vacating the judgment, and dismissing the action, and the court having heard the argument of counsel, and having examined the affidavits and briefs furnished by the respective parties, and having duly considered the same, the court finds that said H. S. Tremper was duly authorized to appear for the plaintiff in said action, and it is considered and ordered that the said motion be, and the same is hereby, overruled. Mason Irwin, Judge.”

It is not ascertainable from this certificate that the affidavits and evidence appearing in the transcript are the affidavits and evidence upon which the judge acted, and, conceding that they were, it does not appear that they were all the affidavits and evidence upon which the conclusion reached by the judge was based. We held in *Windt v. Banniza*, 2 Wash. 147 (26 Pac. 189), that affidavits used upon the hearing of the motion to discharge an attachment are not part of the record, and, in order to be available on appeal, must be brought up by a statement or bill of exceptions. In *Spokane Falls v. Curry*, 2 Wash. 541 (27 Pac.

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

477), which was, as is this case, a motion to set aside a judgment, it was held that the affidavits, not having been made a part of the record by statement or bill of exceptions, could not be considered. In *Clay v. Selah Valley Irrigation Co.*, 14 Wash. 543 (45 Pac. 141), in speaking of this same question, it was said:

“There is nothing to show that they [the affidavits] were all presented or read to the court below on the hearing of the motion, and in order to entitle them to consideration here the fact that they were so presented should have been certified to by the court in some manner, and the motion to strike them is granted.”

In *State v. Howard*, 15 Wash. 425 (46 Pac. 650), in discussing a motion to strike from the transcript what purported to be copies of motions and affidavits for continuance, it was said:

“Such papers, unless authenticated by the certificate of the trial judge and brought into the record upon proper bill of exceptions or statement of facts settled upon notice, cannot be considered, because in no other way can it be determined that they formed any part of the proceedings below, or that the attention of the trial court was ever directed to them. . . . It is not enough that such papers had been filed by counsel with the clerk of the superior court. It does not follow from such findings that the court’s attention has been directed to them. The act of filing is *ex parte* and all such papers (other than the technical record or judgment roll) upon which reliance is had in this court, or to which the attention of this court is to be directed upon appeal, should be brought into the record by an appropriate bill of exceptions or statement of facts.”

In *Jacobson v. Lunn*, 16 Wash. 487 (48 Pac. 237), in discussing this proposition, it was said:

“If appellants desired to have this court review the order appealed from, which upon its face shows that it was made upon affidavits and ‘upon all the facts and records of this

cause,' they should have had a statement of facts settled by the judge."

In *Norfor v. Busby*, 19 Wash. 450 (53 Pac. 715), it was held that affidavits introduced in the lower court would not be considered on appeal unless included in the statement of facts by the certificate of the trial judge. To the same effect, *State v. Anderson*, 20 Wash. 193 (55 Pac. 39); *Armstrong v. Van De Vanter*, 21 Wash. 682 (59 Pac. 510).

So it would seem that this question is pretty well settled in this state. It is conceded by counsel for the appellant that the testimony sought to be introduced was not settled by statement of facts or bill of exceptions, but it is claimed that such settlement was not necessary, under the rule announced by this court in *State v. Vance*, 29 Wash. 435 (70 Pac. 34), and that under such rule it is sufficient if the affidavits appear in the transcript. But what was said in *State v. Vance* on this subject is easily distinguished from the holdings in the cases above cited. In that case one McAnally had made written motion, with affidavit attached, for a continuance. The respondent, upon the appeal, moved to strike the affidavit for the reason that it had not been preserved and made a part of the record in the case by any bill of exceptions or statement of facts, and this court, in overruling that motion, said:

"It appears from the order of the court made upon the motion and the motion itself that the affidavit was considered by the court in passing upon the motion. From this it can be readily determined that the affidavit formed part of the proceedings in the court below, and that the attention of the trial court was directed to it. The affidavit was an integral and inseparable part of the motion, attached thereto, constituting a part thereof, and setting forth, in verified form, the grounds of the motion; and the order of the court expressly recites that the court 'had read the same

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

in support of the motion.' The order of the court is a part of the record. It furnishes conclusive evidence that the affidavit was presented to and considered by the trial court in passing on the motion for a continuance."

Of course, the object in excluding alleged testimony of this kind is, as stated in the opinions above cited, that it does not appear to this court that such alleged testimony was considered by the court, or, if it was, that it was not all the testimony that was considered; and this court would not be empowered to review a decision of the lower court based upon testimony when it did not have before it the testimony upon which the lower court acted. But it is shown in the *Vance Case*, just referred to, that the court did act upon such affidavit without any question, and the objection to the testimony being received here would not obtain. That there was no intention on the part of this court to change the rule laid down in the cases above cited is shown by the fact that it distinguished the case there under consideration from all the cases above cited, and pointed out that the reason which prompted the rule announced in those cases did not obtain in the case under consideration.

The evidence upon which the order of the court was made not having been certified to this court, the motion will be sustained, and the judgment affirmed.

REAVIS, C. J., and FULLERTON, MOUNT and ANDERS, JJ., concur.

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[No. 4462. Decided October 20, 1902.]

THE STATE OF WASHINGTON *on the Relation of John Sanglin v. SUPERIOR COURT OF KING COUNTY, Boyd J. TALLMAN, Judge.*

APPEAL — ORDER APPOINTING RECEIVER — SUPERSEDEAS.

An appeal from an order appointing a receiver will not operate as a stay of proceedings under the receivership, when no supersedeas bond has been given for the purpose of superseding the receiver pending the appeal.

Original Application for Prohibition.

H. E. Foster, for relator.

Leopold M. Stern, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—This is an application for a writ of prohibition. The facts are these: One C. L. Haggard brought an action in the superior court of King county against the relator to recover upon a promissory note and to foreclose a chattel mortgage given to secure the same. After the commencement of the action the plaintiff applied to the court for the appointment of a receiver to take charge of the mortgaged property pending the action, which application the court, after notice and hearing had thereon, duly granted. From this order the relator appealed to this court, giving a bond in the sum of two hundred dollars, conditioned that the appellant would pay all costs and damages that should be awarded against him on the appeal, or on the dismissal thereof, not exceeding the amount of the penalty. Thereafter the plaintiff applied to the court for an order directing the receiver to sell the mortgaged property, and it is to prevent the court from proceeding with a hearing upon the application that this writ is sought.

Oct. 1902.] Opinion of the Court.—FULLERTON, J.

The relator contends that the appeal from the order appointing the receiver removed the cause into this court, and that the trial court is without jurisdiction to make any order in the cause pending the appeal. Manifestly, this contention cannot be sustained. By the statute (§ 6506, Ballinger's) an appeal effects a stay of proceedings only when the appeal bond is conditioned for that purpose. Where the appeal is from a judgment for the recovery of money, the bond, in order to effect a stay of proceedings, shall be in a penalty double the amount of the damages and costs recovered in such judgment, and in other cases "shall be in such penalty, not less than two hundred dollars, and sufficient to save the respondent harmless from damages by reason of the appeal, as a judge of the superior court shall prescribe." The appellant could not, under any circumstances, on an appeal from this order, have given a bond that would have prevented the trial court from proceeding with the trial of the cause on its merits pending the appeal; nor could he, without having the amount of the penalty fixed by the trial court, and giving a bond in such penalty, have superseded the receiver, or prevented the court from taking further proceedings with reference to matters strictly relating to the receivership. As it was, he gave a cost bond, conditioned to pay only such damages as this court might award on the affirmance of the order; and this was insufficient either to supersede the receiver or effect a stay. The cases of *State ex rel. Mullen v. Superior Court*, 15 Wash. 376 (46 Pac. 402), and *Irving v. Irving*, 26 Wash. 122 (66 Pac. 123), are not in point on the facts appearing here. These were cases where the whole cause was removed to this court by the appeal, leaving nothing in the lower court upon which that court was empowered to act.

The application is denied.

REAVIS, C. J., and MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4852. Decided October 22, 1902.]

*In the Matter of the Application of TAKUJI YAMASHITA
for Admission to the Bar.*

JUDGMENT — COLLATERAL ATTACK.

A judgment of the superior court admitting a person of the Japanese race to citizenship, shows upon its face that the court was without authority, and such judgment may be attacked at any time and in any proceeding.

ATTORNEYS — ADMISSION OF ALIENS — CITIZENSHIP — ELIGIBILITY OF JAPANESE.

Under Laws 1895, p. 178, § 6, which provides that no person shall practice law in the state who is not a citizen of the United States, a Japanese is not entitled to admission to practice, since he is ineligible to citizenship, under Rev. St. U. S., § 2169, which restricts the right of naturalization "to aliens being free white persons and to aliens of African nativity and to persons of African descent."

Application for Admission to the Bar.

Takuji Yamashita, pro se.

W. B. Stratton, Attorney General, E. W. Ross, and C. C. Dalton, as amici curiae.

The opinion of the court was delivered by

REAVIS, C. J.—Takuji Yamashita, a native of Japan, applies for admission as an attorney and counselor at law in the courts of this state. He shows that he is over twenty-one years of age, has been a resident of this state for more than one year, and that he has the requisite learning and ability qualifying him for admission. The law relating to the qualifications and admission of attorneys and counselors at law is found in the act of March 19, 1895 (Laws 1895, p. 178), together with the amendment in the act of February 16, 1897 (Laws 1897, p. 12). The law

Oct. 1902.] Opinion of the Court.—REAVIS, C. J.

of 1895 made no provision for admission without an examination. Sections 2 and 3 of the act provided for holding regular examinations for admission, but § 6 of the act declared: "No person shall practice as an attorney and counselor at law in any court of this state who does not reside in the state, or who is not a citizen of the United States." In the act of 1897, § 4 of the former act is so amended in substance as to provide for the admission of attorneys from sister states, upon satisfactory evidence of qualifications, without examination. The amendatory act does not affect § 6 of the original act, which, it may be observed, has been the law since 1881. It is apparent, therefore, that, to entitle the applicant to admission, he must be a citizen of the United States. The qualifications required for admission to the bar are prescribed by law, and they are exclusively within the discretion and policy of the state. One of the conditions required for the applicant is that he must be a citizen of the United States. It is shown by exemplification of the record that an order was entered admitting applicant to citizenship in the superior court of Pierce county on the 14th of May, 1902. It is also urged that such superior court was one of competent jurisdiction, and therefore its judgment must be final, and cannot be questioned here. The record of naturalization shows that the applicant is a native of Japan, and that he renounces allegiance as a subject of the Mikado. The naturalization law requires the applicant to declare on oath that he absolutely and entirely renounces and abjures all allegiance and fidelity to every prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereign of which he was before a citizen or subject (Rev. St. U. S., § 2165, subd. 2), and the proceedings must be recorded by the clerk of the court. Thus the transcript of the order admitting him to citizen-

ship shows that he is of the Japanese race. The judgment of the superior court, if acting within its jurisdiction, is conclusive; but, if the judgment upon its face shows that the court was without authority to pronounce the judgment, the determination is void and must be disregarded. A judgment void upon its face may be attacked at any time and in any proceeding, and the same may be disregarded. *Savage v. Sternberg*, 19 Wash. 679 (54 Pac. 611, 67 Am. St. Rep. 751). Also, as pertinent and relating to such proceedings in naturalization, see *In re Gee Hop*, 71 Fed. 274; *In re Hong Yen Chang*, 84 Cal. 163 (24 Pac. 156).

The question presented is whether one of the Japanese race is eligible under the naturalization laws, for admission to citizenship. The federal constitution confers plenary power upon congress to prescribe the qualifications and conditions for naturalization. All the acts of congress relating to the naturalization of aliens, commencing with that of April 14, 1802, to the Revised Statutes, contain the provision that "any alien being a free white person may be admitted to be a citizen," etc. After the adoption of the 13th and 14th amendments to the federal constitution, and in the act of July 14, 1870, it was enacted by congress "that the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." 16 St. at Large, 256, § 7. This was afterwards revised, and placed in the Revised Statutes,—§ 2169 (see 18 St. at Large, 318),—so as to read, "The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent." And this is the existing law. It is plain that the two races mentioned are now eligible to citizenship under the general naturalization laws; that is, white persons and persons of African (negro) descent and nativity.

Oct. 1902.] Opinion of the Court.—REAVIS, C. J.

It is clear that within the meaning of these words the applicant is ineligible. When the naturalization law was enacted the word "white" applied to race, commonly referred to the Caucasian race. This is well stated in the case of *In re Ah Yup*, 5 Sawy. 155:

"Webster in his dictionary says: 'The common classification is that of Blumenbach, who makes five. 1. The Caucasian, or white race, to which belong the greater part of the European nations and those of Western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian or negro (black) race, occupying all Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and 5. The Malay, or brown race, occupying the islands of the Indian Archipelago,' etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. Linnaeus makes four divisions, founded on the color of the skin: '1. European, whitish; 2. American, coppery; 3. Asiatic, tawny; and, 4. African, black.' Cuvier makes three: Caucasian, Mongol and Negro. Others make many more, but no one includes the white, or Caucasian, with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race.' (See New American Cyclopedias, title 'Ethnology.')"

The courts, federal and state, have uniformly determined that Chinese are not eligible to naturalization, because not white persons. In 1880 it was determined that a native of British Columbia, half Indian and half white, could not be naturalized. *In re Camille*, 6 Fed. 256. In *In re Po*, 28 N. Y. Supp. 383, a native of British Burmah was denied admission. In *In re Kanaka Nian*, a Hawaiian, was denied naturalization. 6 Utah, 659 (21 Pac. 993, 4 L. R. A. 726). In *In re Saito*, 62 Fed. 126, the federal circuit court adjudged that a native of Japan

was of the Mongolian race, and therefore not eligible to naturalization.

But the applicant earnestly urges that the act of congress specially excluding the Chinese from naturalization implies, when considered with reference to our modern treaties with the empire of Japan, that the Japanese were excepted from the general exclusion of the Mongolian race. He also commends the reasoning in the case of *In re Rodriguez*, 81 Fed. 337, as persuasive to a more liberal construction in favor of the Japanese. In that case a native of Mexico, of undefined blood and race, and whose ancestors had for centuries been habitants of Mexico, was naturalized. But such decision was largely controlled by the various treaties with Mexico, and the fact that thousands of Mexicans, without regard to race or color, had been collectively naturalized as citizens of the United States. It is true, the learned judge, in the course of his opinion, suggests other and different views of the meaning of the classification by color contained in the naturalization laws, from those taken by the other authorities heretofore mentioned; but he also seems to concede that the Mongolian race is clearly excluded. It is likewise true that congress has several times collectively conferred citizenship upon bodies of people without reference to race, but the reasons therefor in each instance were plainly special, and such acts cannot be extended beyond the particular instances. The general law, with the single extension made to the African or negro race, has been confined to free white aliens. The law seems to base the classification upon ethnological and racial considerations, rather than in any national distinctions. Whether the classification according to color is technically scientific or natural is not a proper subject of inquiry here. From its existence co-extensively

Oct. 1902.]Syllabus.

with the formation of the American republic, it must be taken to express a settled national will.

The applicant cannot be admitted because he is not a citizen of the United States.

DUNBAR, FULLERTON, ANDERS and MOUNT, JJ., concur.

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[No. 4398. Decided October 23, 1902.]

NELLIE HIGGINS *et al.*, *Appellants*, v. MARY L. NETHERY,
Respondent.

WILLS — PROBATE — RESIDENCE OF TESTATOR.

Under Bal. Code, § 6087, which provides that wills may be probated and letters granted in the county of which deceased was a resident or had his place of abode at the time of his death, or in the county in which he may have died, leaving estate therein, and not being a resident of the state, or in the county in which any part of his estate may be, he having died out of the state, and not being a resident thereof, the question of the testator's place of residence is not a jurisdictional fact, and need not be shown in a petition for probate.

SAME — CONTEST — BURDEN OF PROOF.

Although the order of the court admitting a will to probate is not conclusive of the facts necessary to support it, such as the soundness of mind of the testator and his due execution of the will, yet it makes a *prima facie* case upholding the validity of the will, and the burden of proof is upon contestants thereof to establish that the testator did not execute it, or that he was of unsound mind, or under undue influence.

SAME — MENTAL CAPACITY — NON-EXPERT WITNESSES.

The opinions of non-expert witnesses as to the mental condition of a testator are admissible, when it appears that they had known him personally for a long period of time, associated with him and conversed with him on many occasions, and were acquainted with his mental condition about the time the will was made.

SAME — EVIDENCE.

Evidence of the mental incapacity of a testator at a time long before his will was made would not establish incompetency, where other evidence shows that he was of sound mind prior to, at the time of, and subsequent to the date of the execution of the will.

Appeal from Superior Court, Chehalis County.—Hon. MASON IRWIN, Judge. Affirmed.

W. H. Abel and A. M. Abel, for appellants.

J. A. Hutcheson, for respondent.

The opinion of the court was delivered by

MOUNT, J.—On January 5, 1899, D. W. Organ died in Chehalis county, leaving an estate therein. Prior to his death, and on May 15, 1893, deceased made a will, by which he left one-half of his property to one daughter and the other half to his remaining children, share and share alike. On petition of the executrix named therein, the will was admitted to probate by the superior court of Chehalis county on March 13, 1899. This action was begun by the appellants on February 15, 1901, to set aside the will upon the grounds that the deceased did not make it; that the same is void, because the testator at the time the will was made was not of sound mind, and that undue influence was exercised by the respondent upon the testator prior to the making of the will. On the trial the court found the facts against the contestants, and dismissed the action. From this judgment appeal is prosecuted.

Five errors are assigned, substantially as follows: (1) Error in imposing the burden of proof upon the contestants; (2) error in the admission of evidence of non-expert witnesses; (3) error in the findings of fact; (4) error in the conclusions of law; and (5) error in dismissing the cause. When the cause was called for trial, appellants (plaintiffs below) requested the court to impose the burden

Oct. 1902.] Opinion of the Court.—MOUNT, J.

of proof upon defendant because of certain irregularities which they claimed appeared on the face of the proceedings by which the will in question was admitted to probate, and which it is claimed rendered the proceedings void. The court denied this request, and the ruling is alleged as error. It is claimed that the superior court had no jurisdiction to admit the will to probate, because the petition for the probate of the will failed to state the residence of the deceased, and because residence of the deceased in Chehalis county at the time of his death was necessary to give that court jurisdiction. The petition shows that the deceased died in Montesano, in Chehalis county, Washington, and that said deceased left a will, and an estate consisting of real property within said Chehalis county. The court, when the will was admitted to probate, found that deceased at the time of his death was a resident of said county and state. The statute provides, at § 6087, Bal. Code:

"Wills shall be proved and letters testamentary or of administration shall be granted: (1) In the county of which deceased was a resident or had his place of abode at the time of his death; (2) In the county in which he may have died, leaving estate therein, and not being a resident of the state; (3) In the county in which any part of his estate may be, he having died out of the state, and not having been a resident thereof at the time of his death."

The residence of deceased was not a jurisdictional fact under this statute. The superior court had jurisdiction to probate the will whether the deceased resided in Chehalis county or not, provided an estate was left in that county. It is not claimed that the deceased left no estate in Chehalis county.

It is next objected that the execution of the will was not proved at the time it was admitted to probate. The name of the testator was not signed by himself, but was signed, at his request, by another. The statute in reference to

the execution of wills, § 4595, Bal. Code, requires that a will shall be signed by the testator, or by some other person under his direction, in his presence. The evidence of the subscribing witnesses to the will was reduced to writing at the time of the hearing for probate, and is substantially as follows: That they identified the will; that the same was made on the day it bears date, and was signed by the testator, his signature being written by one of the witnesses in the presence of the witnesses; that the testator thereupon declared to them that the same was his last will and testament, and requested the witnesses, in attestation thereof, to sign the will as witnesses, which they then and there did in the presence of the testator and in the presence of each other; that at the time of executing the said will the testator was 74 years of age, of sound and disposing mind, and not under duress, menace, fraud, or undue influence; that subsequently, in January, 1899, the testator died, leaving real estate in Chehalis county. The court found these facts to be true, and made an order admitting the will to probate. Counsel for appellant contends that this evidence does not fairly indicate that Daniel W. Organ was present when his name was signed to the will. We think the clear import of this evidence is that the name of the deceased was signed in his presence. It was certainly sufficient for the court to act upon in admitting the will to probate, and sufficient to support an order of probate until it was shown that the contrary was true. The rule is settled in this state that when a will is offered for probate there must be proof that the deceased was of sound mind when the will was made. *In re Baldwin's Estate*, 13 Wash. 666 (43 Pac. 934). But the rule announced in that case does not go to the extent claimed in the case at bar. When the record shows, as it does in this case, that the court had jurisdiction, and all the facts appear to show

Oct. 1902.] Opinion of the Court.—MOUNT, J.

prima facie a valid will, the order of the court admitting the will to probate must have some force. For that reason the burden must be upon the plaintiffs to show that the will was invalid by reason of the facts alleged, viz., that the testator did not execute the will, or that he was not of sound mind, or was under undue influence, at the time he made it. The order admitting the will to probate is not conclusive of the facts necessary to support it, but when the facts appear of record they must be taken as true until the contrary is shown.

Non-expert witnesses were permitted to state their opinion as to the mental condition of the testator during his life time. Each of these witnesses testified, in substance, that he was well acquainted with the deceased prior to his death; that he had known him personally for a considerable period of time, and associated with him and conversed with him on many occasions. Under these circumstances it was not error to receive the opinions of such witnesses as to the mental condition of the deceased prior to his death, and at or about the time the will was made. Schouler, Wills, § 201; *Sears v. Seattle, etc., Ry. Co.*, 6 Wash. 231 (33 Pac. 389); 1 Greenleaf, Evidence (16th ed.), § 430p.

At the trial of this case no attempt was made to show that the testator did not in fact make the will, or that he was not present when the will was executed, and no evidence was offered by the plaintiffs to show that any undue influence of any kind was used by any person or exercised in any way on the deceased to cause him to make the will in question. Some slight evidence of his mental incapacity long before the will was made was introduced, but this evidence falls far short of proof that the testator, at the time he made the will, was not competent to make it. The evidence on the part of defendant, we think, clearly

shows that the testator prior to, at the time of, and subsequent to the time when the will was made, was of sound mind, and knew what he was doing. It also shows that the testator made, executed, and published the will in the presence of the subscribing witnesses, and that he was not acting under duress or undue influence of any kind.

The findings of fact made by the lower court are in accordance with the great weight of the evidence, and the judgment was therefore right, and is affirmed.

REAVIS, C. J., and DUNBAR, FULLERTON and ANDERS, JJ., concur.

[No. 4199. Decided October 24, 1902.]

SEATTLE & MONTANA RAILROAD COMPANY, *Appellant*, v.
HENRY ROEDER *et al.*, *Respondents*.

EMINENT DOMAIN — CONDEMNATION PROCEEDINGS — RAILROAD RIGHT OF WAY — MARKET VALUE OF LAND — EXPERT WITNESSES — SCOPE OF CROSS-EXAMINATION.

A large discretion is reposed in the trial court in the matter of allowing cross-examination of expert witnesses where market value is involved; and where such witnesses were allowed on direct examination to fix the value of a stone quarry condemned for a railroad right of way and the damages resulting from its appropriation, it was not error to permit cross-examination concerning the methods by which the witnesses arrived at their conclusions as to the injury, what elements of damages they had considered, and the reasons for their conclusions.

SAME — SEGREGATION OF LAND — VALUATION ON PARCELS.

In an action to condemn lands for a right of way, it was not error to permit defendant's witnesses to segregate the lands sought to be appropriated and then place valuations upon the different parcels, especially where plaintiff was the first to pursue that course in arriving at a basis of compensation.

Oct. 1902.]

Syllabus.

SAME — STONE QUARRY — VALUATION BY EXPERT — COMPETENCY OF WITNESS.

A witness as to the value of a stone quarry and as to how it should be worked was qualified to testify when it was shown that he had owned and operated stone quarries, that he knew the quarry in controversy, had lived in its vicinity for thirteen years, had examined the property with reference to a purchase thereof, and was acquainted with its market value.

SAME — EVIDENCE — INCREASED DIFFICULTY OF OPERATION OF QUARRY.

In condemnation proceedings for the appropriation of a railroad right of way along a stone quarry, evidence is admissible for the purpose of showing that the most advantageous way to work the quarry is by blasting, and that this could not be done without great care and increased expense by reason of the proximity of the railroad.

SAME — ROYALTIES — ADMISSIBILITY OF LEASE.

In such proceedings a lease of the quarry by the owners is admissible in evidence for the purpose of showing the royalty paid by a lessee for the stone, as tending to fix both the value of the land and of his leasehold interest.

SAME — EVIDENCE AS TO MARKET VALUE.

Evidence that a stone quarry had a market value in the county, but was probably not saleable there because of the lack of local purchasers with money enough to pay for it, would not constitute prejudicial error, where the inquiry was as to the damages suffered by the appropriation of such quarry for railroad right of way.

SAME — REBUTTAL TESTIMONY.

The refusal to admit rebuttal testimony on the subject of the location of shale in certain portions of a ledge of stone was not error where plaintiff had gone into the question in his case in chief.

ARGUMENT OF COUNSEL — WAIVER BY DEFENDANT — EFFECT.

Where counsel for defendants waive argument on their part after the opening argument has been made for plaintiffs, it is not error for the court to refuse to allow further argument on the part of plaintiffs, under Bal. Code, § 4993, subd. 5, which provides that "the plaintiff or party having the burden of proof may by himself or one counsel address the court and jury upon the law and facts of the case, after which the adverse party may address the court and jury in like manner by himself and one counsel, or by two counsel, and be followed by the party or counsel first addressing the court."

SAME — MEASURE OF DAMAGES.

In condemnation cases the measure of damages is the fair market value of the land taken for railroad right of way at the time of the appropriation, together with the amount of depreciation, if any, in the value of the land not taken, and these respective amounts are to be ascertained without regard to any benefit that may result from the construction of the railroad.

SAME — INSTRUCTIONS.

The refusal of the court to charge as requested that the only elements which the jury should take into consideration as tending to reduce the market value are "those which are appreciable and substantial, and which will actually lessen the market value of the property taken," was not error, where the court, in its own language, correctly stated what elements of damage the jury might consider.

SAME — PRESUMPTION AS TO PRIVILEGE OF CROSSING RIGHT OF WAY.

A requested instruction to the effect that no presumption arises that defendants will be refused the privilege of crossing plaintiff's right of way afoot from one part of defendant's lands to another was properly refused, since the presumption would naturally be the other way.

SAME — PRESUMPTION OF CONTINUANCE OF EXISTING RENTAL VALUE.

A requested instruction that if the jury found the quarry property was held by a lessee they would not be justified in assuming that the amount of rental paid under the lease would continue in the future as the fair rental value was properly refused, since the existing rental value would be presumed to continue until the contrary was shown.

SAME — RELIANCE ON VIEW OF PREMISES.

Where there is a conflict in the testimony, it is not error to charge the jury that they may resort to the evidence of their senses on the view to determine the truth.

SAME — ELEMENTS OF DAMAGE — ELIMINATION BY CONTRACT.

An agreement of a railroad company to construct culverts to carry water across its right of way from one part of defendants' lands to another part where it was needed would not eliminate the possible obstruction of such flow as an element of damage in the appropriation of the right of way, when the agreement does not bind the railroad not to obstruct the flow, nor to carry it across the right of way as convenient for defendants as its natural flow.

Oct. 1902.] Opinion of the Court.—MOUNT, J.**SAME — VALUE OF LAND FOR SPECIAL PURPOSE.**

Where quarry land is appropriated in condemnation proceedings, the jury are entitled to take into consideration as an element of damage the value of the land with the stone in it, but cannot take into consideration the profits that might be realized on the stone after its removal from the ledge.

SAME — EXCESSIVE DAMAGES.

A verdict for \$80,000 for the appropriation of a right of way through a stone quarry will not be disturbed, when there is nothing to indicate passion or prejudice on the part of the jury, and there was testimony on the question of injury to the property ranging from \$6,000 to \$175,000.

Appeal from Superior Court, Whatcom County.—Hon. JEREMIAH NETERER, Judge. Affirmed.

Will H. Thompson and Kerr & McCord, for appellant.
Fairchild & Bruce and Newman & Howard, for respondents.

The opinion of the court was delivered by

MOUNT, J.—On July 23, 1901, the appellant filed its petition in the court below praying for condemnation of a right of way over the land of respondents. On October 21 of the same year, all the parties having appeared in the cause, the court made and entered an order adjudging that the use was a public use, and that there was a necessity therefor, and ordered a jury to determine the compensation to be paid to the respondents for the lands appropriated, and for the damages occasioned by reason of the appropriation. A jury was thereupon impaneled, and the cause proceeded to trial. On November 1 the jury returned a verdict in favor of the respondents Henry Roeder, Victor E. Roeder and wife, and Lottie T. Roth, for \$72,000, and in favor of C. I. Roth, a lessee of the property, in the sum of \$8,000. Judgment was entered upon the verdict, and from this judgment appeal is prosecuted.

The lands in controversy consist of tide lands and uplands upon which a sandstone quarry, known as the "Chuckanut Quarry," is located. The stone quarry lies on the face of a cliff ranging from 75 to 200 feet in height, and extending for a distance of about 6,000 feet north and south. This cliff faces on Chuckanut bay, an arm of Puget Sound, and the base of the cliff lies along the water front, against which the tide ebbs and flows. The tide lands lie between the face of the cliff and deep water. The ledge of stone known as the "Chuckanut Quarry" lies exposed against the face of this cliff at an angle of about 60 degrees. The right of way sought to be condemned lies near the base of this cliff at the north end, and extends along the same, and across respondents' property. About midway of the quarry the right of way enters upon the quarry, and from that point south appropriates the whole of the ledge. The right of way is 80 feet in width in front of and along the quarry, and at other places is 100 feet in width, and lies between shipping and the quarry. The saw mills, shops, power house, and other buildings used in connection with the quarry are in the right of way, and the construction of the road necessitates their removal. The petition and decree reserved to respondents an easement across appellant's right of way for carrying stone to a dock for shipment, and a location for mills and shops and derricks, and also agrees to carry whatever fresh water flows from the uplands across the right of way. The respondent C. I. Roth had a five-year lease of the quarry property, and was in active operation thereof.

Appellant makes forty-four assignments of error in its brief. The first nine assignments are based upon rulings of the court in permitting cross-examination of appellant's witnesses upon the profits of quarrying the stone, upon

Oct. 1902.] Opinion of the Court.—MOUNT, J.

the specific buildings in which the stone has been used, upon the current price of stone from the quarry, upon the possible use of tide lands, upon the cost of fills and the effect of cutting off certain streams of water upon the uplands from the tide lands, upon the amount of stone in the "big blast" and the cost of quarrying the stone elsewhere, upon the value of certain kinds of stone in the quarry fixed with reference to the lease of defendant C. I. Roth, and upon the effect of cutting off the quarry from navigable water. Whether the cross-examination upon these points was admissible or not depends largely upon the range taken in the direct examination. To a clear understanding of the questions presented it would be necessary to set out a large part of the examination, both direct and cross, which we do not deem necessary, because definite rules for cross-examination cannot be applied in all cases, and each case must necessarily depend largely upon its own peculiar features. The trial judge has a large discretion in allowing cross-examination of witnesses where market value is involved, and where expert witnesses are resorted to to establish such value. We shall not, therefore, burden this opinion by setting out the evidence upon which these questions arose. It is sufficient to say that the witnesses in giving evidence upon direct examination were asked to fix, and did fix, the value of the property condemned, and the damage which, in their opinion the defendant's would suffer by reason of the construction of the appellant's line of railroad. The questions to which exceptions were taken arose generally when, upon cross-examination, the witness was asked concerning the method by which he had arrived at his conclusion as to the damage, what elements of damage he had considered, and his reasons for his opinion. No doubt great latitude was given in both the direct and cross-ex-

amination of all the witnesses, but great latitude should be allowed in cases of this character, because the objects of such cross-examination are principally to determine the credibility of the witness, and whether or not the element of damages which he has considered is proper or improper to be considered, and whether he has taken into consideration all the elements of value in arriving at a conclusion. We have gone through the entire evidence, and are satisfied that no reversible error as to these particular questions has occurred.

Errors assigned numbered 10, 14, 15 and 19, are that respondents' witnesses were permitted to place values upon the property in the segregate; that is, upon the stone in the south half of the quarry, and upon the stone in the north half thereof, and upon the value of the upland and upon the value of the tide land. The question presented here will be discussed more fully under the instructions further on in this opinion. We think this was not error. Where different classes of property are taken, it seems that witnesses ought to be allowed to fix a value upon each different class. At any rate, this was the course pursued by the appellant. It was permitted, when making out its case, to introduce evidence as to the value of these several classes of property, and for that reason alone respondents should be permitted to meet the evidence in the same way. *Tacoma Light & Water Co. v. Huson*, 13 Wash. 124 (42 Pac. 536).

Errors 11 and 12 relate to motions to strike out certain evidence of the witness Black, going to the value of the property, and how the same should be worked, because he did not qualify himself to testify. Mr. Black testified that he knew the lands in controversy; had lived in the vicinity thereof for thirteen years; had large real estate holdings; was in the real estate business, and had

Oct. 1902.] Opinion of the Court.—MOUNT, J.

sold \$200,000 worth in the last two years; had examined the property with reference to purchasing the same; had owned and operated stone quarries, and that he knew the market value of the property. The evidence relating to the manner of working the property went to the damage caused the portion of the quarry not taken because of the proximity of the road to the workings. We think from this examination he was qualified to testify as to the value and to the method of operating the property, and that both motions were properly denied. *Montana Ry. Co. v. Warren*, 137 U. S. 348 (11 Sup. Ct. 96); *Chicago & E. R. R. Co. v. Blake*, 116 Ill. 163 (4 N. E. 488); *Santa Ana v. Harlin*, 99 Cal. 538 (34 Pac. 224).

The errors complained of numbered 13, 16, 17, 18, 20, 21, 22 and 24 relate to the dangers to the railroad from the operation of the portion of the quarry not taken, to the present market value of the stone, the effect of powder in blasting, the probable future demand for the stone, the manner in which the quarry should be worked to the best advantage, and how much less valuable the quarry left would be after the road was constructed. These objections were made by the appellant to the introduction of evidence by the respondents. There were two classes of property taken: (1) Tide lands, and (2) the uplands, on which were located the sandstone quarry. The principal value of the uplands consisted in the stone quarry. The line of road ran in a north and south direction nearly parallel to the ledge of the quarry, so that from about the middle of the ledge the southern portion of the ledge was entirely within the right of way, and the north portion thereof was very near the base of the ledge. The location of the road upon a part of the quarry of course confiscated that portion. It is not difficult to understand that the

value of the stone on the land and its accessibility constituted the chief value of the land taken. This value depended largely upon the market value of the stone in the quarry. As to the part not taken the damage would depend largely, if not wholly, upon the extent to which the location of the road would affect its accessibility. If the location of the road was so near the quarry as to injuriously affect the operation thereof so that the stone might not be taken out as cheaply as with the road not there, this would be an element of damage to be considered. For this reason the court properly, we think, permitted evidence on the part of the respondents to show that blasting could not be done without great care and increased expense, by reason of the proximity of the road, and that blasting was the most advantageous way to operate this quarry.

The 23d assignment of error is that the court erred in admitting in evidence the lease executed by the respondents Lottie Roth, Victor Roeder, and Henry Roeder to respondent C. I. Roth. The execution of this lease was conceded by the appellant. It was introduced by the respondents to show the royalty which the lessee was paying for the stone as tending to fix the value of the land and of his leasehold interest. We think it was competent for these purposes. Certainly, the value of the land must depend largely upon the direct revenue which it brings to the owner and lessee. If the lease was a valid lease, it had a tendency to show the value of the property. It was not like evidence tending to show probable rental value. It shows a present fact,—the actual rental value. The good faith of such a lease may be questioned, but it would still be competent to go to the jury and be considered by them, unless they should find it was made for fraudulent pur-

Oct. 1902.] Opinion of the Court.—MOUNT, J.

poses, or was unreasonable in the light of all the evidence bearing upon it.

The 24th assignment of error is that the witness Stangroom was permitted to testify that Whatcom county was not a market in which a purchaser for the property could be expected to be found. The evidence of this witness was to the effect that the property had a market value in that county, but that probably no man was to be found in the county with money enough to pay for it, and that a purchaser would be found somewhere else. We think the evidence was proper; but, at any rate, its admission would not constitute reversible error.

The 25th and 26th assignments of error relate to the court's refusal to permit certain witnesses to testify in rebuttal to the location of shale in certain portions of the ledge, on the ground that the evidence was not proper rebuttal. Appellant had gone into this question in his case in chief, and for that reason, the ruling of the court was not error.

When the evidence for both parties was closed, appellant's counsel opened the argument to the jury. After this counsel had closed his argument, respondents waived argument, whereupon other counsel for appellant demanded the right to further argue the case to the jury. This the court refused, and upon this ruling the 27th assignment of error is based. The statute upon this question (§ 4993, Bal. Code, subd. 5), is as follows:

"After the conclusion of the evidence and the filing of request for charge in writing or instructions, the plaintiff or party having the burden of proof may, by himself or one counsel, address the court and jury upon the law and facts of the case, after which the adverse party may address the court and jury in like manner by himself and one counsel, or by two counsel, and be followed by the party or counsel

of the party first addressing the court. No more than two speeches on behalf of plaintiff or defendant shall be allowed."

It is not necessary in this case to decide whether this section of the statute is mandatory or directory. If the statute is mandatory, the court was certainly right, because one counsel only has the right to open the argument for the party having the burden of proof. If the adverse party waives its right to make an argument to the court or jury, there is no one for the opening counsel to follow. If the statute is directory merely, and the court has a discretion to allow counsel for the opening party to again address the jury there is not shown here any abuse of that discretion. The court limited the arguments to three hours on each side. Counsel opening the argument for appellant occupied but thirty minutes of this time, leaving two and one-half hours for the closing argument. It would be manifestly unfair to allow counsel, after respondents had waived their argument under the assumption that the case was closed thereby,—as is and has been the usual practice in the courts of this state,—to reopen the case, and occupy the remainder of the time allowed. This ruling was not error.

The 28th assignment of error is not argued in the briefs, and for that reason we pass it by.

The 29th, 36th, 37th, 38th, 39th and 40th assignments of error relate to instructions requested by appellant and refused by the court. Appellant requested the court to instruct the jury, in effect that, if the location of the road increases the value of the land taken, the railroad company could not be required to pay to the owner the increase of value due solely to the location of the road, and it is argued that the constitution (§ 16, art. 1), provides that compensation, irrespective of any benefits for any improve-

Oct. 1902.] Opinion of the Court.—MOUNT, J.

ments proposed, applies only to the lands taken, and does not apply to the damages occasioned to the lands not taken. This question is no longer an open one in this state, and it is, therefore, unnecessary to refer to cases cited from other states. It was first held by this court in *Northern Pacific & P. S. R. R. Co. v. Coleman*, 3 Wash. 228, 234 (28 Pac. 514), that the measure of damages for lands appropriated "is the difference in amount between the value of the tract as a whole, not including therein the increased value, if any, occasioned by the proposed improvements, and the value of the land left, and not including therein such increased value." But this case was expressly overruled in *Enoch v. Spokane Falls, etc., Ry. Co.*, 6 Wash. 393 (33 Pac. 966), and the court there said:

"We think that the true measure of damages in such cases is the fair market value of the land taken at the time of the appropriation, together with the amount of depreciation, if any, in the value of the land not taken, and that these respective amounts should be ascertained irrespective of, that is, without regard to, any benefits that may have resulted from the construction or proposed construction of the railroad."

This rule has been since followed in this court. *Kaufman v. Tacoma, Olympia, etc., R. R. Co.*, 11 Wash. 632, 635 (40 Pac. 137). It was, therefore, not error to refuse the instruction.

Appellant requested the court to give the following instruction:

"In assessing the damages to the market value of the property not taken, you should not take into consideration anything as an element of damages which is remote, or imaginary, or uncertain, or speculative, even though mentioned or testified about by witnesses; but the only elements which you should take into consideration as tending to reduce the market value are those which are appreciable

and substantial, and which will actually lessen the market value of the property taken."

The first part of this instruction down to the word "witnesses" was given by the court in substantially the language requested, but instead of the remaining portion the court said:

"In estimating the damages to the remainder of the property, or that portion of the property described in the petition that is not taken, you should consider the effect, if any, upon the property by the construction of the road, and should award to the respondents such a sum as the evidence in this case convinces you, together with your view of the premises, the market value has depreciated by reason of the construction of the road in the manner as proposed."

And then the court proceeded to correctly state what elements of damage the jury may consider. The latter part of the instruction requested necessarily followed as a conclusion from what was said in the former part; and, where the court subsequently correctly told the jury what elements of damage they might consider in determining the damages to the property not taken, there was a sufficient compliance with the request. For that reason it was not error to refuse the requested instruction.

The 37th assignment of error is that the court refused to instruct the jury, in effect, that no presumption arises that the residents upon the upland of respondents will be refused the privilege of crossing petitioner's right of way to and from the water front and tide lands afoot. It was not error to refuse this instruction. If any presumption at all arises as to such privilege, it is that the appellant will refuse the privilege. *Cedar Rapids, etc., Ry. Co. v. Raymond*, 37 Minn. 204 (33 N. W. 704).

The 38th assignment is based upon the refusal of the court to instruct the jury that, if they found that the

Oct. 1902.] Opinion of the Court.—MOUNT, J.

quarry property was held by a lessee, they would not be justified in assuming that the amount of rental paid therefor at this time will continue in the future as the fair rental value. This instruction was properly refused. If the rental value was fair and reasonable at the time the lease was made, it will be presumed to continue so until the contrary is found to exist.

The 39th and 40th assignments are based upon refusals of the court to give requested instructions to the effect that the jury would not be permitted to take into consideration any speculative uses of the lands taken or those not taken. The court, as we have already seen, did instruct the jury to that effect. It also said:

“In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private individuals, and in assessing the value of the land actually taken and the damages to the land not taken, you should not assess the same on the basis of what the owner would take for it, or any part thereof, or what you would take were you the owner of the land, and let the railroad go across as proposed to be located and constructed; these are improper to be taken into consideration, either in fixing the value of the land taken or assessing the damages to the land not taken; but you should at all times keep in mind the actual market cash value of the lands taken and the decrease in market value, if any, of the lands and property not taken. . . . You are further instructed that the defendants in this case are entitled to the fair cash market value on the 23d day of July, 1901, of the real estate taken, regardless of the causes which gave such real estate its value.”

The errors assigned as 30, 31, 32, 34, 35 and 44 relate to instructions given by the court. The court instructed the jury, in substance, that the recovery in this case was limited to the actual cash value of the lands taken, plus the damage to the lands not taken, irrespective of any benefit,

from the proposed improvements. We have already considered this question under the instruction requested by appellant upon the same subject in error alleged as numbered 29, *supra*. It is unnecessary to discuss it further here. If it was not error to refuse the requested instruction it was not error to give this instruction, because this is the reverse of the one requested.

The jury, by consent of both parties, were permitted to view the premises, and the court instructed the jury as follows:

"You have been permitted, gentlemen of the jury, under direction of the court, to view the premises sought to be condemned in this case, and also the lands of the respondents which they claim will be injured by reason of the taking of the land sought. You are impaneled for the purpose of estimating the damages which the petitioner must pay to the respondents for the taking and injuriously affecting their property. In cases of this kind, no certain amount can be mathematically fixed as the amount of the damages which should be awarded. You must, therefore, trust somewhat to your own judgment in arriving at this definite amount, and one of the objects and purposes of the view which you have made is to enable you to use your own senses and judgment by obtaining such information as an eye-witness can gain of the general quality and condition of the land, the uses to which it has been put, or to which it is applicable, the manner in which the taking of a part of the tract would affect the residue, the location of the road, and better to understand and apply the evidence of the witnesses who have testified before you. As to these matters, you must remember, as part of the evidence in this case, what you witnessed in viewing the premises, and you have the right, and it is your duty, to use your senses; and if any witness has testified to anything which you know, by the evidence of your own senses on the view, is false, you would not be bound to believe, and, indeed, you could not believe, the witness, and you may disregard his

Oct. 1902.] Opinion of the Court.—MOUNT, J.

testimony, although no other witness has testified on the stand as the jury knows it to be; and if, in your judgment, the evidence is conflicting as to the value of the property taken and the injury to the balance, you should resort to the knowledge gained upon your view as bearing upon the weight to be given to the various and conflicting statements and estimates."

When instructing upon the credibility of witnesses, after enumerating what the jury may consider in determining the weight to be given to the statements of witnesses, the court said:

"It is your duty to harmonize the testimony of all the witnesses, if possible, so as to impute perjury to no witness. If this can be done consistent with the truth, you should do so. But if you find it impossible to harmonize the testimony, and if you find further from the evidence of your senses on the view or from the testimony on the stand, that any witness who has testified before you has wilfully testified false concerning any material fact in the case, you will then have a right to disregard his entire testimony, except in so far as you may find it corroborated by other credible evidence or other facts or circumstances proved upon the trial."

It is to this last instruction that exception is taken upon the ground that the instruction assumed that the judgment formed by the jury from the view of the premises is infallible. The jury, by these instructions, are not told that they may assess the damages to the property according to their notion as obtained by a view of the premises without regard to the evidence of witnesses. Such a rule cannot obtain. But they are told that, where there is conflict in the testimony, they may resort to the evidence of their senses on the view to determine the truth, and this, we think, is correct. The rule is well stated in *Washburn v. Milwaukee, etc., R. R. Co.*, 59 Wis. 364 (18 N. W. 328), where it is said:

"We understand that the object of a view is to acquaint the jury with the physical situation, condition, and surroundings of the thing viewed. What they see they know absolutely. If a witness testify to anything which they know by the evidence of their senses on the view is false, they are not bound to believe, indeed cannot believe, the witness, and they may disregard his testimony, although no other witness has testified on the stand to the fact as the jury know it to be. For example, if a witness testify that a certain farm is hilly and rugged, when the view has disclosed to the jury and to every juror alike that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned, no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in disregard of testimony given in court."

The instruction excepted to has reference to conflicting testimony, and is certainly within the rule that the jury in such cases may make use of the knowledge disclosed by the view to determine the truth. The instruction excepted to was not error.

The court instructed the jury as follows:

"As you have been before instructed, where property is taken for public purposes the owner is entitled to its fair market cash value for the uses to which it may be most advantageously applied, for which it would sell for the highest price in the market; and if you should find from the evidence in this case that portions of the land taken border on the shores of Chuckanut bay, and that the lands immediately in front thereof are available for manufacturing purposes of any kind, and that, in order to utilize, lease, or sell them for such purposes, it would be necessary to have fresh water; that on other portions of the land not taken there is fresh water sufficient for the purpose; and that the construction of this road will interfere with the bringing of the water over the right of way,—this is an element that you would have a right to consider in estimating

Oct. 1902.] Opinion of the Court.—MOUNT, J.

the damages sustained. In this connection you should also take into consideration the fact that the railway company has stipulated in this case and agreed to construct culverts upon its right of way, under its track, for the transmission of water from all springs now upon the uplands not taken, and that the railway company would be bound by such stipulation to construct its road in such manner as to permit the flow of the water from such springs across its right of way."

This instruction is objected to upon the ground that, under the agreement named, this element of damage should have been eliminated from the consideration of the jury. There is nothing in the stipulation nor in the record to show that the railroad company was bound not to obstruct the flow of any such water, or to carry it across the right of way at any particular place or places as convenient to the respondents as the same naturally flows. But the stipulation agrees merely to construct culverts to carry the water across the right of way. This may or may not leave an element of damage, according to the manner and the place at which the water is carried across the right of way, and whether it may or may not be obstructed in its flow. We think, under the stipulation and under the facts in dispute in this case, a question of fact remained, which should have been submitted to the jury. The instruction was a fair statement of the law, and was not error.

The court instructed the jury as follows:

"In this case, if you should find that land taken contains building stone, you are instructed that the measure of compensation is the fair market value of the land taken with the building stone in it, and the profits or the price or value of such building stone, if the same or any part thereof will be taken by the proposed right of way, should not be considered by you as building stone in arriving at your verdict. The number of tons of building stone that could

be gotten from the land, and the value per ton thereof, or the royalties thereon, are not to be considered except as they may guide you in fixing the value of the lands taken or injury to quarry lands; and as a special rule for your guidance in arriving at the value of any portion of the quarry which you may find from the evidence will be taken, and of the amount of damages to any portion of the quarry not taken, I instruct you that the compensation to be awarded by you to the owners is to be estimated by a reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the near future."

It is insisted that this instruction is error, because it allows the jury to take into consideration the number of tons of building stone that could be taken from the land, and the value per ton thereof, and the royalties thereon, as a guide in fixing the value of the land taken. Here is a limestone quarry in active operation, convenient, accessible to water transportation, where the stone was exposed on the face of the cliff, and easily, readily, and cheaply taken out. The lands were useful principally for the stone lying thereon. The right of way appropriated one-half of this ledge of stone, and ran between the other half and water transportation. The authorities agree that, where land taken contains mineral, the measure of compensation is the sum that would be given for the land with the mineral in it. But any inquiry as to the profits or the price or the value of the minerals, if the minerals themselves have been taken out, will not be permitted. 10 Am. & Eng. Enc. Law (2d ed.), p. 1158; 6 Am. & Eng. Enc. Law, p. 560; *Sanitary District of Chicago v. Loughran*, 160 Ill. 362 (43 N. E. 359); *Searle v. Lackawanna & B. R. R. Co.*, 33 Pa. St. 57; *Port v. Huntington, etc., R. R. Co.*, 168 Pa. St. 19 (31 Atl. 950).

Oct. 1902.] Opinion of the Court.—MOUNT, J.

This land has a special value as stone-producing land. The owners, therefore, are entitled to compensation according to its value as such. *Sanitary District v. Loughran, supra.* It is like lands with buildings thereon, or timber land, or lands having any other commodity which is a part of the land itself. It is not like annual crops, the profits of which are necessarily uncertain. While the profits or price or value of the minerals, if the minerals themselves are taken out, may not be considered, yet the value and extent and quality of the stone, or the buildings, or the timber, as the case may be, as it exists upon the land may be considered. Lewis, *Eminent Domain*, § 486. If the extent and quality and value of the stone as it lies on the land may not be considered, there would be no way by which the value of the land with the stone could be shown. All legitimate evidence tending to establish the value of the land with the mineral in it is permissible. The jury were not authorized by this instruction to fix the value of the stone apart from the land, but were instructed that they might consider the quantity of stone that could be gotten from the land, and the value thereof, or royalty thereon, "*as a guide in arriving at the value of the land.*" If a piece of land taken contains valuable improvements, those improvements apart from the lands may not be considered; yet certainly the character, nature, and extent of the improvements, and the revenue derived therefrom, are as essential to be considered in arriving at the value of the land as the land itself or the uses to which it may be put.

In *Boom Co. v. Patterson*, 98 U. S. 403, the court said:

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully

guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

In *Dupuis v. Chicago & N. W. Ry. Co.*, 115 Ill. 97 (3 N. E. 720), the court said:

"The petitioner's fifth instruction in substance directed the jury that they should not take into consideration any profits, or supposed profits, realized from the business carried on upon such lands or lots, or the probable character of such business or profits in the future. Such profits are not proper elements in ascertaining the damages to which the defendants are entitled in this proceeding. This instruction was, in our opinion, calculated to mislead the jury. It may be true that the profits or supposed profits arising from the business was not a proper element of damages, as declared in the instruction, but it will be observed that the instruction does not stop with profits or supposed profits, but goes further, and informs the jury that they should not take into consideration the character of the business transacted on the property. As said before, the main inquiry was the fair market value of the property to be taken, but in arriving at a solution of this question it was proper for the jury to consider the purposes for which the lands were used,—whether they were adapted to that particular use, whether the lands were profitable and valuable for that use; and in so far as the particular use to which the lands were or had been appropriated added to their market value, that might be considered by the jury. If the lands were valuable, as located, bordering on or near the river, as it is contended they were, for a saw-mill, planing-mill, or factory of any description, or for any other purpose, the testimony tending to prove such purpose was proper for the consideration of the jury, in passing upon the fair market value of the property taken or damaged."

See, also, *Alloway v. Nashville*, 88 Tenn. 510 (18 S. W.

Oct. 1902.] Opinion of the Court.—MOUNT, J.

123, 8 L. R. A. 123). If the jury are entitled to take into consideration the uses for which the property is suitable, they certainly have the right to consider whether the property is adapted to the particular uses claimed for it, and whether it is or is not profitable and valuable for such uses. Whether property is profitable and valuable for a particular use is always a controlling consideration in determining the value of the property itself. It follows that the quantity of stone that could be gotten from the land, and the value thereof, or the royalty thereon, are proper to be considered by the jury as a guide in determining the market value of the land.

It is also assigned that the verdict is against the law and evidence, and grossly excessive. The verdict seems large, but the property also appears valuable. We have gone over the whole record, which is somewhat extensive itself, and have concluded that the law was fairly given in the case. While a large range was taken in the examination and cross-examination of witnesses, and while the witnesses differed widely in their estimates of the value of the property taken and the damage to that not taken,—some placing the damage to the entire property as high as \$175,000, others estimating it as low as \$6,000,—there is nothing in the record to indicate any prejudice or passion as influencing the jury. We do not feel disposed to substitute our own judgment for that of the jury whose duty it is to assess the damage, simply because the amount may seem to us large; especially where there is abundant competent evidence upon which to base the verdict.

Finding no reversible error in the record, the judgment will be affirmed.

REAVIS, C. J., and DUNBAR and ANDERS, J.J., concur.

[No. 4847. Decided October 24, 1902.]

PETER DAVID *et al.*, *Appellants*, v. ANDREW GUICH *et al.*,
Respondents.

APPEAL — BOND — JUDGMENT DEBTOR AS SURETY.

Under Laws 1893, p. 122, § 7, which provides that "the appeal bond must be executed in behalf of the appellant by one or more sureties," an appeal bond is insufficient when it has no other sureties thereon than parties against whom the judgment appealed from was entered.

SAME — FILING NEW BOND — DISMISSAL OF APPEAL.

Where the appeal bond executed by appellant was ineffective and the time for filing a bond had expired, his appeal will be dismissed without his being permitted to file a new and sufficient bond.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Appeal dismissed.

Fremont Campbell, for appellants.

Arthur Remington and *William P. Reynolds*, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—Respondents move to strike out appellants' brief, dismiss the appeal, and affirm the judgment herein, for the following reasons: (1) That the brief does not contain references to the pages of the transcript for verification, or contain a clear statement of the case; and that, this being an equity case, tried by the court without a jury, the appellants have failed to print the findings of fact or exceptions thereto, or the findings requested by appellants, which were refused, or any part thereof, upon any of the questions sought to be raised by the appeal. (2) Because no appeal bond has been given or filed, with sureties, as re-

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

quired by law. (3) Because no transcript on appeal was filed with the clerk of the superior court within the time limited by law or prior to making this motion. (4) Because no briefs were served or filed within the time limited by law or prior to making this motion. (5) That the statement of facts is not certified upon the notice, or in the manner required by law.

There is something to be said in favor of this motion on most of the reasons alleged, but, in any event, this appeal will have to be dismissed for the second reason stated, viz., that no appeal bond has been given or filed, with sureties, as required by law. There are numerous appellants, and the bond is given with D. Constanti and S. David, both of whom are judgment debtors and appellants in this case, as sureties; no other surety being given on the bond. We held in *Smith v. Beard*, 21 Wash. 204 (57 Pac. 796), that, where the sureties on the bond were parties against whom the judgment appealed from was entered, the bond was not sufficient to bring the case here on appeal; that that was a matter which affected the substance, and not the form, of the appeal bond, and the appeal for that reason was dismissed,—citing *Northern Counties Investment Trust v. Hender*, 12 Wash. 559 (41 Pac. 913). The object of an appeal bond is to furnish the respondent with additional security during the pendency of the appeal. The judgment debtors are already bound by the judgment. Their obligation is not increased in any way by the mere formal furnishing of a bond signed by them. Such a bond would be valueless to the respondents, for, after a successful suit upon such bond, they would have nothing but a judgment, which they already have. Hence the bond is utterly worthless, and not in any sense the bond contemplated by the statute. The law prescribes, and we have uniformly

Syllabus.

[30 Wash.]

held, that "an appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party conditioned . . . be filed with the clerk of the superior court . . ." Laws 1893, p. 122, ch. 61, § 6; *Smithson v. Woodin*, 13 Wash. 709 (43 Pac. 638); *Savage v. Graham*, 14 Wash. 323 (44 Pac. 540); *Ramage v. Littlejohn*, 16 Wash. 702 (47 Pac. 888).

The appellant upon the argument of the cause offers to file a new and sufficient bond, but the time for filing a bond having expired, and the bond under consideration being ineffectual for any purpose, the appeal will be dismissed, and the judgment affirmed.

REAVIS, C. J., and MOUNT, FULLERTON and ANDERS, JJ., concur.

[No. 8552. Decided October 27, 1902.]

THE STATE OF WASHINGTON *on the Relation of E. V. Bussell v. ROBERT BRIDGES, Commissioner of Public Lands, et al.*

MANDAMUS — BOARD OF APPRAISERS — SALE OF PUBLIC LANDS — DISCRETIONARY POWER.

Mandamus will not lie to compel the board of appraisers of state lands to readvertise and resell a tract of tide land upon the application of a purchaser who offers twenty-five per cent. more than it was sold for, since Laws 1897, p. 240, § 15, which authorizes a resale under such circumstances, makes it discretionary with the board whether or not a resale shall be ordered.

Original Application for Mandamus.

Fred Rice Rowell, for relator.

Thomas M. Vance, for respondents.

Oct. 1902.] Opinion of the Court.—REAVIS, C. J.

The opinion of the court was delivered by

REAVIS, C. J.—Application for writ of mandate. The petition, in substance, states that on January 27, 1900, lots 1 to 14, inclusive, in block 77, Seattle tide lands, were duly advertised for sale, and at said sale the highest and best bid was made by Daniel Kelleher; that the report of said sale was duly filed with the board of state land commissioners on January 30, 1900; that on March 31, 1900, and before the expiration of the thirty days provided by law for the issuance of the contract under said sale, petitioner filed in the office of the board an application in writing to purchase said described tide lands at an advance of more than twenty-five per cent. on the amount bid by said Kelleher at the sale, and deposited at the same time with said board one-tenth of the purchase price offered by petitioner, together with one dollar for fees for the contract, and demanded of said board a readvertisement and sale of said parcels of tide lands; that the board declined to readvertise and re-offer said lands for sale, for the reason that petitioner was present and had the opportunity to bid at the sale already made. Petitioner prays that a mandate issue to respondents, directing them to readvertise and again offer for sale said tide lands. A general demurrer is made by respondents to the petition.

The question at issue arises upon the construction of § 15 of Laws of 1897, p. 229, "Relating to Public Lands of the State," which is as follows:

"That the member of the said board of appraisers, or the county auditor conducting the sale, shall, upon making sale of any school land, or stone, mineral or timber thereon, report such sale to the said board of appraisers, as provided in this act, together with other information touching the same as the said board shall have prescribed, and within thirty days from the date of the reception of such report,

if no affidavit showing that the interests of the state in such sale were injuriously affected by fraud or collusion shall have been filed with said board, and if it shall appear from such report that the sale was fairly conducted, and that the purchaser was the highest bidder at such sale, and that his bid was not less than the appraised value of the property sold, and if the said board shall be satisfied that the land sold would not, upon being readvertised and sold, sell for at least twenty-five per cent. more than the price at which it shall have been sold, and that the payment required by law to be made at the time of making sale has been made, the said board shall confirm the sale, and thereupon the chairman of the said board shall issue to the purchaser a contract of sale, as in this act hereinafter provided."

The language found in this section, "if the said board shall be satisfied that the land sold would not, upon being readvertised and sold, sell for at least twenty-five per cent. more than the price at which it shall have been sold," seems to vest in the board the discretion to order a new sale. The writ of mandamus can only issue to compel the board to perform a plain duty which is ministerial, and cannot control the exercise of discretion. Whatever right may exist to review an arbitrary exercise or abuse of discretion, such remedy cannot be invoked in mandamus.

The writ is denied.

FULLERTON, ANDERS, DUNBAR and MOUNT, JJ., concur.

[No. 3545. Decided October 28, 1902.]

FRED L. GEDDIS, *Respondent*, v. S. T. PACKWOOD, *Appellant*.

FORECLOSURE OF MORTGAGE — REDEMPTION BY JUDGMENT CREDITOR.

A judgment creditor had no right of redemption from a mortgage foreclosure sale which was made prior to the act of 1897

Oct. 1902.]

Opinion Per Curiam.

(Laws 1897, p. 75, § 15), which was the first enactment in this state conferring upon judgment creditors such right, but which expressly declared that rights of redemption from sales rendered prior thereto should remain unaffected.

Appeal from Superior Court, Kittitas County.—Hon. JOHN B. DAVIDSON, Judge. Affirmed..

Graves & Englehart, for appellant.

Kauffman & Frost, for respondent.

PER CURIAM.—Respondent (plaintiff) purchased certain real estate in Kittitas county at a mortgage foreclosure sale. At the time of the sale, appellant, Packwood, owned two judgments which he claimed were liens on the same premises. Appellant made application as judgment creditor to redeem from the foreclosure sale. Respondent thereupon brought this suit to enjoin the sheriff from issuing a certificate of redemption, and appellant was permitted to intervene. The superior court ruled against appellant's right to redeem. Upon consideration of the record, it is concluded that the appellant has valid judgment liens upon the said premises, and therefore the only substantial issue presented is whether a judgment creditor can redeem from a judgment foreclosing the mortgage, entered prior to the act of 1897, relating to sales under executions and redemption therefrom. In *Parker v. Dacres*, 2 Wash. T. 439 (7 Pac. 893), it was determined that there was no right of redemption from a mortgage foreclosure after sale. Thereafter the act of February 3, 1886, was enacted, which is found in 2 Hill's Code, § 513, where it is provided that the judgment debtor or his successor in interest may redeem; but no mention of, or provision for, the judgment creditor, was made in said section. The act of 1897 (Laws 1897, p. 75, § 15), confers upon the judg-

ment creditor the right to redeem at execution and foreclosure sales. But § 18 provides that the rights of redemption from sales made upon judgments rendered prior thereto shall remain unaffected. The act of 1899 (Laws 1899, p. 89, § 7), also confers upon and maintains for the judgment creditor the right of redemption. But § 18, p. 95, expressly repeals all the preceding acts relating to redemption, and provides that such repeal shall not affect any rights existing under the former redemption acts. It may be observed the right to redeem on the foreclosure sale is statutory. (See *Parker v. Dacres, supra.*) No statute is found which extends the right of redemption from foreclosure sales to the judgment creditor until the statute of 1897, *supra*; and it was again conferred in the act of 1899, *supra*. But in each act there is an express reservation that such rights conferred shall not be applicable to judgments entered before their enactment. Upon this review it is concluded the judgment of the superior court should be affirmed.

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[No. 4881. Decided October 28, 1902.]

F. V. PIERCE, *Appellant*, v. COMMERCIAL INVESTMENT COMPANY *et al.*, *Respondents*.

GARNISHMENT — LIABILITY OF SHERIFFS — STATUTES — REPEAL.
Laws 1885-86, p. 43, § 19 (Bal. Code, § 5367), which provides that a sheriff or constable may be garnished for money of the defendant in his hands, was not repealed by the later enactment on the subject of garnishments, when such subsequent act (Laws 1893, p. 95) contained no provision respecting the garnishment of public officers, and its repealing clause merely provided that "all acts and parts of acts in conflict with this act be and the same hereby are repealed."

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

Appeal from Superior Court, Pierce County.—Hon.
THAD HUSTON, Judge. Reversed.

Stanton Warburton, for appellant.

T. O. Abbott, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—Appellant in the court below garnished the sheriff of Pierce county, claiming that he, the said sheriff, had funds in his hands belonging to respondents. The sheriff moved to dismiss the garnishment proceedings on the ground that, as sheriff of Pierce county, and a public officer, he cannot be garnished. This motion was sustained by the court and the cause dismissed. So that it will be seen that there is but one point to be determined in this case, viz., can a sheriff be garnished for moneys in his hands received by him in the discharge of his official duty?

Appellant cites in support of his claim §5367, Bal. Code, which provides that a sheriff or constable may be garnished for money of the defendant in his hands, and cites also *Russell v. Millett*, 20 Wash. 212 (55 Pac. 44). But while a garnishment in that case was sustained by this court, the question of the legality of the garnishment in that particular was not raised by the briefs in the case. The cause was decided on other grounds, and under the circumstances this court would not feel bound by that decision. But outside of that case, we are inclined to think that under existing laws the sheriff may be garnished. Section 5367, *supra*, is § 19 of Laws of 1886, p. 43. It is contended by the respondents that the act of 1893 (Laws 1893, p. 95), entitled "An act in relation to garnishments," being a complete act within itself, repeals all the provisions of the act of 1886 in relation to garnishment. It will be observed that the repealing clauses of the act of

1893 and that of 1886 are essentially different. The repealing clause of the act of 1893 (Laws 1893, p. 102, § 27) is as follows: "All acts and parts of acts in conflict with this act be and the same hereby are repealed;" while the repealing clause of the act of 1886 is much more sweeping, providing that certain chapters of the Code shall be repealed, "and all other laws heretofore enacted upon any subject matter contained in this act be and the same are hereby repealed," excepting only actions pending at the time of the passage of the law. (Laws 1885-86, p. 46, § 38). So that by the repealing act of 1886 it was the expressed intention of the legislature to repeal all acts upon the subject matter therein contained enacted, and make a complete law governing attachments and garnishments. But not so with regard to the act of 1893. The repealing clause in that act added nothing, for all acts in conflict would be abrogated anyway by the subsequent and later act; so that the pertinent question is, is § 19 of the law of 1886 in conflict with any of the provisions of the subsequent act of 1893? Counsel cites several cases decided by this court, among which is *Wooding v. Puget Sound National Bank*, 11 Wash. 527 (40 Pac. 223), where it is claimed that this identical law in question was construed in respondents' favor. In that case a writ of attachment was issued, and the sheriff gave notice to the respondents in writing that all debts, credits, moneys, or other personal property in their possession, or due by them or either of them to one William White, were levied upon, and requesting each of the respondents to furnish him with a memorandum thereof, which they failed to do. Nothing, however, was done in the case for more than two years, and the respondents were cited to appear and answer respecting such debts and property. They appeared, and moved to

Oct. 1902.] Opinion of the Court.—DUNBAR, J.

dismiss the proceedings in garnishment on the ground that any rights which the appellant had acquired by reason of the service of the writs of garnishment had become barred by the lapse of time and the statute of limitations. This court decided that the respondents could not be held upon the merits, and also that the appellant had lost his right under the writs of garnishment by reason of the lapse of time. It is true the court further said that the attachment-garnishment law under which the first proceedings were had was repealed before the respondents were cited to appear and testify, and that the act of 1893 contained no saving clause, and, inasmuch as the repeal was absolute and unconditional, the effect was to quash all pending proceedings. But this was simply as to a question of proceeding. Section 19 of the act of 1886 does not seem in any way to be connected with the procedure. It is independent of the rest of the act, and would have constituted a complete act within itself if the legislature had seen fit so to enact it. The act of 1893 seems to be an act the office of which is to point out a procedure, and deals exclusively with the procedure. It does not undertake to prescribe who may or may not be garnished, but simply provides what the procedure shall be when any one is garnished. And § 19 is in no way in conflict with it.

The case of *Northern Pacific R. R. Co. v. Haas*, 2 Wash. 376 (26 Pac. 869), only holds that the intention of the legislature in enacting laws should be ascertained, and, if it sufficiently appears that it was intended that a subsequent general law should supersede all prior legislation upon the same subject, general or special, though not expressly so stated, effect should be given to such purpose. There is no doubt of the correctness of this rule, and of the general rule that subsequent enactments which are in con-

flict with prior enactments repeal by implication the prior enactment. The case of *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619 (59 Pac. 507, 75 Am. St. Rep. 862), is simply an announcement of this rule, the court in that case holding that the subsequent act was complete within itself, and stating that the provisions in relation to the notice were in conflict with the express provisions of the later act, and were therefore repealed. The same may be said of the other cases cited by appellant. The object of the garnishment proceeding enacted in 1893 was to give a readier remedy by garnishment than was provided in the act of 1886. In the act of 1886, in which garnishment proceedings are coupled with attachment proceedings, the attachment affidavit had to be to the effect that the defendant was about to remove his property from the territory fraudulently, or had fraudulently assigned, secreted, or disposed of the same, or was fraudulently about to convert his property into money for the purpose of placing it beyond the reach of creditors, or was guilty of fraud in contracting the debt, etc., and this affidavit was the basis of the garnishment proceedings. It was thus made difficult to secure property by garnishment under that act; and the act of 1893, more liberal in respect to the procedure, was enacted. In any event, there seems to us to be no conflict between the act of 1886, in relation to who may be garnished, and the subsequent act of 1893, providing a garnishment procedure. We conclude, therefore, that the law providing for the garnishment of sheriffs and constables was not repealed by the subsequent act of 1893, and that the court erred in sustaining the motion to dismiss.

The judgment will be reversed, and the cause remanded, with instructions to the lower court to overrule the motion.

REAVIS, C. J., and MOUNT, ANDERS and FULLERTON, JJ., concur.

Oct. 1902.] Opinion of the Court.—MOUNT, J.

[No. 4859. Decided October 29, 1902.]

BRIGHAM-HOPKINS COMPANY, *Appellant*, v, DAVID GROSS
et al., Respondents.

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PARTNERSHIP — DEATH OF PARTNER — SETTLEMENT OF ESTATE — LIABILITY OF SURVIVING PARTNERS.

After the settlement of a partnership estate upon the death of one of the partners, the creditors of the firm may maintain an action against the surviving partners for any balance of their claims remaining unpaid. (*Brigham-Hopkins Co. v. Gross*, 20 Wash. 218, limited).

SAME — ACTION AGAINST SURVIVING PARTNERS — SUSPENSION OF STATUTE OF LIMITATIONS.

The right of partnership creditors to enforce their claims against surviving partners being postponed under the provisions of Bal. Code, §§ 6189, 6190, until after the settlement of the deceased partner's estate, the running of the statute of limitations against such claims would be suspended during such period.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Reversed.

Bates & Murray, C. M. Easterday and John H. Mc Daniels, for appellant.

Fremont Campbell and Fogg & Fogg, for respondents.

The opinion of the court was delivered by

MOUNT, J.—This action was brought in the lower court against the respondents, who are the surviving members of a partnership known as Gross Brothers, to recover upon five separate accounts contracted by the firm of Gross Brothers prior to its dissolution. The firm, at the time the accounts sued on were contracted, was composed of David Gross, Morris Gross, Ellis Gross, and Abraham Gross. After the debt was contracted, Abraham Gross died, and two of the surviving members of the firm were appointed

Opinion of the Court.—MOUNT, J.

[30 Wash.]

administrators of the partnership estate. Thereafter a claim for the indebtedness was duly filed with the administrators of the partnership estate and allowed. Subsequently a dividend of sixteen per cent. was ordered paid upon the claims against the partnership estate. This dividend exhausted the partnership estate. After the assets of the partnership estate were all distributed, and the estate finally settled, and the administrators discharged, the appellant brought this action against the survivors for the balance of its claim, alleging the facts set out above, and in addition thereto that the estate of Abraham Gross, deceased, was insolvent, and had been fully settled, and the administrator thereof discharged. A demurrer to the complaint was sustained by the court below, and the cause dismissed. Plaintiff appeals.

The principal question presented on this appeal is, can a creditor of a partnership maintain an action against the surviving partners thereof after the death of one of the partners, and after the settlement of the partnership estate, when the partnership assets have not been sufficient to pay all the debts of the partnership? In the case of *Brigham-Hopkins Co. v. Gross*, 20 Wash. 218 (54 Pac. 1127), which was a case brought by this appellant against these same respondents upon the same indebtedness, it was held that the appellant could not maintain the action pending the administration of the partnership estate, because, under §§ 6189 and 6190, Bal. Code, the surviving partners were entitled to administration upon the partnership estate, which was primarily liable for the partnership debts. Whatever may be said as to the correctness of the rule therein announced, it cannot be said that such a rule is not just, especially where no rights of the creditors are lost by reason of the delay. Ordinarily the partnership assets

Oct. 1902.] Opinion of the Court.—MOUNT, J.

should first be subjected to the payment of partnership debts, before the individual property of a partner is subjected thereto. Parsons, Partnership (4th ed.), § 253. And this we think is as far as the rule in that case was intended to apply, and is as far as we now think it should be permitted to extend. While we do not desire to overrule the decision upon the point decided in that case, viz., that a creditor cannot maintain an action against surviving partners pending settlement of the partnership estate in probate, we deem it advisable to say that much of the argument of that decision is merely dictum, which, upon fuller investigation, we cannot follow. The rule is well settled that at law the creditors of a partnership must bring their actions against the surviving members only. Parsons, Partnership (4th ed.), § 349; 2 Bates, Partnership, § 746; Story, Partnership, §§ 358-361; George, Partnership, p. 384; 1 Lindley, Partnership (2d Am. ed.), p. 676; Shumaker, Partnership, p. 438. There is no statute of this state changing the common law in this respect. The rule, therefore, under § 4783, Bal. Code, prevails here. Section 6188, Bal. Code, and the following sections in reference to the administration of partnership estates, were correctly construed in *Harrington v. Herrick*, 64 Fed. 468 (12 C. C. A. 231), where the court said:

“The Washington statute does not take away the right a surviving partner has of administering the assets of the firm, but only guards it in the interests of representatives of the deceased partners, by requiring a bond, and substitutes the supervision of the probate court for a court of equity. The obligations of the surviving partner are not released, and the remedies of the creditors are not changed.”

Under the decision of this court in *Brigham-Hopkins Co. v. Gross, supra*, however, the remedies of the creditors are

changed to this extent, namely, they are postponed pending the settlement of the estate, and no action at law can be maintained until after the settlement of the partnership estate. With this exception, the common-law rule is not changed. It follows, therefore, that after the settlement of the partnership estate the creditors of the firm may maintain an action against the surviving partners for any balance of their claims remaining unpaid.

If the creditors cannot maintain an action pending the settlement of the partnership estate, as was held by this court in *Brigham-Hopkins Co. v. Gross, supra*, by reason of the provisions of § 6189 and § 6190, then, under § 4812, Bal. Code, the statute of limitations ceases to run pending the settlement. It was said in *Brigham-Hopkins Co. v. Gross, supra*:

“In the respondents’ brief, authority has been cited sustaining the proposition that a delay in suing until after the partnership estate has been closed would bar an action against the survivor, but that was in equity. We do not see how it could apply to the present action.”

This was, no doubt, intended to mean that the statute of limitations would not run in this kind of a case pending the settlement of the partnership estate, the court having in mind the rule that the statute of limitations does not run against a creditor who is by higher law prevented from bringing his action. *Brooks v. Bates*, 7 Colo. 577 (4 Pac. 1069); Bal. Code, § 4812. A contrary view is expressed in *Brigham-Hopkins Co. v. Gross*, 107 Fed. 769, but that decision was expressly based upon the rule announced in *Harrington v. Herrick*,—that the remedy of the creditor was not postponed pending the settlement of the partnership estate. But this court, in *Brigham-Hopkins Co. v. Gross*, 20 Wash. 218, held that the remedies of the creditors were postponed pending such settlement.

Nov. 1902.]

Syllabus.

For the reasons given, the judgment of the lower court is reversed, with instructions to overrule the deinurrer.

REAVIS, C. J., and DUNBAR, FULLERTON and ANDERS, JJ., concur.

[No. 4482. Decided November 8, 1902.]

THE STATE OF WASHINGTON on the Relation of Lowman & Hanford Stationery & Printing Company, Respondent, v. JOHN RIPLINGER, Comptroller of the City of Seattle, Appellant.

MUNICIPAL CORPORATIONS — AMENDMENT OF CHARTER — SUBMISSION TO VOTE.

The fact that a charter amendment consisting of seven sections was submitted to a vote of the people as one proposition instead of as seven would not invalidate the submission, under a charter regulation providing "that if more than one amendment be submitted at the same general election the same shall be submitted at such election in such manner that each proposed amendment may be voted on separately without prejudice to the others," where it was plainly the intention that the new provisions should be substituted as a whole for the old provisions, all the sections being part of one article devoted to but one special subject.

SAME — EFFECT OF AMENDMENT — REPEAL BY IMPLICATION — EXPENDITURE OF LIBRARY FUND — POWERS VESTED IN LIBRARY BOARD.

The adoption of an amendment to the Seattle city charter providing that the library board shall alone have authority to expend the library fund, and shall certify every such expenditure to the city comptroller, who shall issue his warrants therefor to the city treasurer and the same shall be paid out of any money in the library fund not otherwise appropriated is a repeal, so far as the expenditure of the library fund is concerned, of art. 9, § 7, of the charter, which provides that warrants can be drawn only in pursuance of an order of the city council, and of § 12, of art. 9, which declares that all claims against the city of whatsoever na-

ture shall be examined and allowed or disallowed by the auditing committee.

Appeal from Superior Court, King County.—Hon. Boyd J. TALLMAN, Judge. Affirmed.

Mitchell Gilliam and *William Farmerlee*, for appellant.

Preston, Carr & Gilman and *Jay C. Allen*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal from an order and judgment granting a peremptory writ of mandate against the appellant, who is comptroller and *ex officio* clerk of the city of Seattle, requiring him to issue and deliver to the relator a warrant upon the treasurer of the city of Seattle, payable out of the library fund, for the sum of \$245.29. On the petition of the relator an alternative writ was issued, to which the appellant filed his return. The court adjudged the return insufficient in law, and granted the peremptory writ. There is no dispute as to the facts. Prior to the city election of 1902, the charter of the city of Seattle, article 14, provided for the library department of the city. Said article 14 consisted of seven sections. Sections 1 and 2 in the original article are practically the same as in the amended article. Omitting said sections, the article is as follows:

“Sec. 3. There shall be five library commissioners appointed by the mayor, who shall hold office for five years, serve without compensation, and be subject to removal by the mayor. The five commissioners first appointed shall so classify themselves that one of them shall go out of office each year, beginning December 31, 1896. The commissioner having the shortest term to serve shall be chairman of the commission, and the librarian shall be secretary thereof. There shall be a librarian appointed by the

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

mayor, whose appointment and tenure shall be subject to the provisions of article XVI of this charter.

“Sec. 4. Subject to the direction and control of the city council, the librarian shall have the custody, management and control of the library, and, under civil service rules, have the appointment and removal of his subordinates.

“Sec. 5. It shall be the duty of the library commissioners to visit the library at least monthly, and to make proper recommendations to the mayor, city council and librarian concerning the management of the library and the purchase of books.

“Sec. 6. The city council shall provide for the expense of operating, maintaining and enlarging the library by monthly appropriation from the library fund, the same to be expended in the manner provided by ordinance or by this charter, but shall not have power to create any debt or obligation against the fund, except in so far as there shall be money therein with which to pay the same.

“Sec. 7. The Seattle Public Library shall be open for the use of the public under such regulations as the city council shall by ordinance prescribe.”

On the 23d day of December, 1901, the city council passed a resolution, No. 677, of which the following is a copy :

“That sections 1, 2, 3, 4, 5, 6 and 7, of Article Fourteen of the City Charter of the City of Seattle be amended so as to read as follows:

“ARTICLE FOURTEEN.

“The Library Department.

“Section 1. That there shall be a library fund, which shall consist of:

First—Such gifts, bequests and devises as may be given, bequeathed or devised to the city of Seattle or any trustee for the uses or purposes of the ‘Seattle Public Library.’

Second—Ten per centum of the gross receipts of the city from all fines, penalties and licenses.

Third—The rents, issues and profits derived from any

property which may be held or owned in trust for said library by the city or any other trustee.

Fourth—Any appropriation that the city council may make for said fund from time to time.

Fifth—Such annual tax levy as the city council may provide.

“Section 2. The title of all property belonging to the Seattle Public Library shall be and remain in the name of the city and shall be held inviolable in trust for the use and benefits of said library.

“Section 3. There shall be seven library trustees who shall constitute and be known as ‘The Library Board,’ and be the governing body of the library. The mayor, with the consent of the city council, shall appoint seven trustees, each of whom shall hold office for seven years without compensation, and be subject to removal by the mayor. The present library commission, together with two new commissioners to be appointed by the mayor, one for the term of six years and one for the term of five years, beginning April 1, 1902, shall be the first library board, and the present commissioners shall continue to hold office as such trustees until the first day of April next succeeding the expiration of their respective terms as commissioners; and the mayor shall hereafter annually appoint one trustee for the term of seven years, beginning on the first day of April each year.

“Section 4. The librarian shall be elected by the board and subject to removal by it. Under civil service rules, he shall, by and with the consent of the library board, have the appointment and removal of all subordinate employees of the library.

“Section 5. The library board shall have the management and control of the public library as provided by the laws of the state of Washington, and shall alone have authority to expend the library fund; and the board shall certify every such expenditure to the city controller, who shall issue his warrants therefor to the city treasurer, and the same shall be paid by the treasurer out of any money in the library fund, not otherwise appropriated.

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

"Except as herein provided, the powers and duties of the library board and the management of the public library shall be according to the other provisions of this charter, and the laws of said state.

"And Be It Further Resolved, That the foregoing amendments be, and the same are hereby, submitted to the qualified voters of the city of Seattle for their ratification or rejection at the next general election to be held March 4, 1902."

At the general city election held on the 4th day of March, 1902, pursuant to said resolution, a ballot was prepared and voted upon in the following form:

"For proposed amendment No. 4 to the City Charter of the City of Seattle, as proposed by Resolution No. 677 of the City Council of said City, which said proposed amendment relates to the Library Department of the City.

Against proposed amendment No. 4 of the City Charter of the City of Seattle, as proposed by Resolution No. 677 of the City Council of said City, which said proposed amendment relates to the Library Department of the City."

At said election the amendment was adopted. Two questions are raised on this appeal, viz: (1) Was the said proposed amendment legally adopted as a part of the city charter of the city of Seattle? (2) If so, does it have the effect of requiring the comptroller to issue a warrant upon the city treasurer solely upon the certification of the library board, without any action by the city council? It is contended by the appellant that the manner in which these amendments were submitted is opposed to the provisions of the city charter relating to the proposal and adoption of amendments, which provides "that if more than one amendment be submitted at the same general election the same shall be submitted at such election in such manner that each proposed amendment may be voted on separately

without prejudice to the others;" and that inasmuch as there were seven separate sections of the charter in the ballots submitted to the voters at the election, all to be voted upon in one form of ballot, the voters were not permitted to segregate the sections which they might favor from those they were opposed to, and that they should have been permitted to vote upon each section separately. We think there can be no substantial objection to the manner in which this amendment was submitted. It seems plain that it was the intention to submit an entirely different scheme for the control and management of the library and the payment of its expenses, that the amendment proposed was in furtherance of this purpose, and that it was, in substance, an independent amendment. There is no provision that the amendments should be submitted in different sections. As is well said by the respondents, "There is no more reason in case of amendment in requiring each section to be separately submitted than for requiring each sentence to be so submitted;" that it is the unity of subject that is demanded by the charter provision requiring each amendment to be submitted separately. It appears evident from the language of the amendment that it was the intention that the new provision, as a whole, should be substituted in lieu of the old provision, as a whole. That being so, the voter was not deprived of the right to exercise his choice in voting upon the amendment.

We also think that it was the intention of the amendment to compel the comptroller to issue a warrant upon the city treasurer solely upon the certification of the library board, without any action by the city council. Section 5 provides, in terms, that the board shall alone have authority to expend the library fund; that it shall certify every such expenditure to the city comptroller, who shall

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

issue his warrants therefor to the city treasurer, and the same shall be paid by the treasurer out of any money in the library fund not otherwise appropriated. This provision is so clear and explicit that we are unable to construe it. Nothing that could be said would elucidate it. And if, as is contended, it is in conflict or inconsistent with and repugnant to the provisions of §§ 7 and 12 of article 9, being the last expression of the law making power on that subject, it must control. As was said in *Roche v. Mayor*, 40 N. J. Law, 257:

“Every statute must be considered according to what appears to have been the intention of the legislature, and even though two statutes, relating to the same subject, be not in terms repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the original act. The rule does not rest strictly upon the ground of repeal by implication, but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions contained in the later act as the only ones on that subject which shall be obligatory.”

A comparison of the original sections with the sections amended conclusively shows that it was the intention of the city council to revise the entire matter to which they both had reference, and to substitute the new law for the old.

The judgment will therefore be affirmed.

REAVIS, C. J., and ANDERS, MOUNT and FULLERTON, JJ., concur.

[No. 4201. Decided November 8, 1902.]

JOSIE CZARECKI *et al.*, Respondents, v. SEATTLE & SAN FRANCISCO RAILWAY & NAVIGATION COMPANY *et al.*, Appellants.

COAL MINES — VENTILATION — DUTY OF OPERATOR — DEATH OF MINER FROM SUFFOCATION.

In an action to recover for the death of a workman in a coal mine caused by suffocation, an instruction was proper which set forth Bal. Code, § 3165, to the effect that the operator of every coal mine shall provide a good and sufficient amount of ventilation for such persons as may be employed therein, and then charged the jury that "the purpose of this law is to provide a reasonably safe place for the men to work in, and that the ventilation of the working places of the men shall be such as to maintain them reasonably safe from dangerous gases by a good and sufficient ventilation of the mine. This is a positive duty imposed upon the operator and owner of the mine, and for the neglect of this duty the law holds such operator or owner liable if damages result therefrom."

SAME — ASSUMPTION OF RISK.

In such an action, it was proper to charge the jury that the degrees of care required of an operator of a coal mine and of the workmen employed underground differ; that "the miner or workman assumes only such risks and dangers as are open and apparent to him, or one in his position, and which are necessarily incident to his employment."

SAME — DELEGATION OF MASTEE'S DUTY — WORKMAN AS VICE PRINCIPAL.

An instruction that a loader was a vice principal, as to part of his work, when a portion of his duties was to keep the chutes open as an airway, was proper, where the necessary ventilation of the mine was a positive duty of the operator.

SAME — CONCURRING NEGLIGENCE OF FELLOW SERVANT.

Where the negligence of the coal mine operator in failing to afford good and sufficient ventilation in the mine was the cause of injury to a miner, the fact that the act of a fellow servant concurred in producing the injury would not excuse the master.

Nov. 1902.] Opinion of the Court.—REAVIS, C. J.**SAME — EVIDENCE — NOTICE TO OPERATORS — COMPLAINTS OF BAD VENTILATION.**

Evidence that complaints of the insufficient ventilation of the mine were made to the managers about the time of the suffocation of deceased was admissible for the purpose of showing knowledge on the part of the operator of the condition of the mine.

SAME — OPINIONS OF EXPERTS.

The admission of expert testimony is a matter within the discretion of the trial court, upon a showing of competency of the witnesses deemed satisfactory by the court.

NEW TRIAL — GROUNDS — INSANITY OF WITNESS.

The refusal of the trial court to grant a new trial on the ground of the insanity of one of the witnesses of the prevailing party will not be disturbed, where the testimony of the witness as given on the trial appears clear and intelligent, without any indication of mental aberration, and the trial court upon determining the motion for new trial found that the witness, though subject to certain hallucinations, was capable of making an intelligent and connected statement upon his examination at the trial.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Affirmed.

Wilshire & Kenaga (Kerr & McCord, of counsel), for appellants.

Govnor Teats and Root, Palmer & Brown, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Appellants were jointly operating a coal mine at Leary, King county. John C. Czarecki, the deceased, had for several months prior to the 26th day of October, 1900, been in the employ of appellants as a coal miner. The general plan of working the mine was as follows: A gangway or tunnel had been driven in upon the vein of coal a distance of about 450 feet, and fifteen chutes, about 30 feet apart, had been driven above the gangway. No. 15 was inside chute. The chutes were

driven upward on the vein from the gangway at a pitch of between 40 and 45 degrees. At a distance of 20 feet up the chutes from the gangway there was the first crosscut, 4 feet by 4 in size, driven from chute No. 15 parallel with the gangway, and intersecting the other chutes. Chute No. 10 was driven through to the surface of the ground on the top of the hill, and at its exit was an electrical ventilating fan. All the chutes to and including No. 13 were closed between the gangway and first crosscut to prevent the air going through them from the gangway, and the main air course was through the gangway to chutes 14 and 15, and thence through them to the first crosscut, and thence back along the first crosscut to the exit at the top of chute No. 10. The second crosscut was driven through from chute No. 13, intersecting chutes Nos. 12, 11, and 10, 30 feet above the first crosscut; and 30 feet above the second was the third crosscut, driven through between chutes 13 and 12. A permanent stopping was placed between chutes 13 and 12 in both the second and third crosscuts, by which the air current was turned up chute No. 13 to the third crosscut, and thence to the exit at chute 10. The fan at the top of No. 10 created a vacuum, and the pressure of air blowing in at the gangway and into the crosscuts through chutes 14 and 15, and thence through chute 13, the third crosscut, and to the exit, made the circulation for ventilating the mine. The deceased went to work on the morning of the 26th of October, 1900, in chute No. 14, which had been before mined about 18 feet above the first crosscut by other miners. That afternoon he was found dead from suffocation caused by "black damp,"—carbonic acid gas. He was found by two or three miners who were searching for him. The allegations of negligence in the complaint are as follows:

Nov. 1902.] Opinion of the Court.—REAVIS, C. J.

"That in the operation of the same mine on the 25th and 26th days of October, 1900, the defendants allowed the coal to go down through chute No. 15 and fill and block the air way and air passage so that at or about the time of the death of deceased herein complained of there was no ventilation in the said mine and especially in chute 14, and the air could not pass through the airways and could not ventilate the said mine and clear the same from poisonous and obnoxious gases. That in the operation of the said mine and the mining of the chutes the defendants did not provide brattice for the purpose of forcing the air up into the chutes, and at the time of the death of deceased, and for a long time prior thereto, there was no air passage up into the working place of chute No. 14 whatever, and through the negligence of the said defendants in not providing brattice so as to force the air up into the chutes and clear the same of gas and smoke and in allowing the airway to become blocked with coal at and near chute No. 15 and gas accumulated in the working place of chute No. 14 as herein set out, which was unknown to deceased but known to defendants and by reasonable care and diligence and inspection defendants could have discovered the same before ordering the deceased to enter the working place as herein complained of in said chute No. 14 on the said 26th day of October, 1900. That upon the 26th day of October, 1900, the deceased John Czarecki was directed by the foreman of the defendants, J. O. Edward, to work in chute No. 14. That the said chute was at that time driven up into the coal above the airway of first crosscut to the height of about 49 feet. That the deceased John Czarecki went to his working place in said chute No. 14, which was at or near the said second crosscut, as directed by the said defendants' foreman, and without any knowledge of the existence of deathly and obnoxious gases which had accumulated and been allowed to accumulate by the defendants in the working place of said deceased through the insufficient amount of ventilation, and was smothered and suffocated and killed by the said poisonous gases

soon after going into his working place upon the said 26th day of October, 1900."

The answer denies the material allegations of the complaint, and set up affirmatively as defenses contributory negligence on the part of deceased, and that he assumed the risk of a dangerous place in the mine. A number of special interrogatories were submitted to the jury at the request of the appellants, which together with the answers were as follows:

"1. Was it the duty of John Czarecki, the deceased, to put up a brattice cloth or canvas in the chute in which he was working? Answer: No.

"2. Was a brattice cloth or canvas up in place in chute fourteen above the first crosscut in defendants' mine? Answer: No.

"4. Was chute fourteen above the first crosscut in defendants' mine the working place of the deceased, John Czarecki? Answer: Yes.

"5. Was there sufficient air circulating at the intersection of the first crosscut and chute fourteen to sustain the life of a man working as a miner in the defendants' mine? Answer: Yes, at said point.

"6. Would a brattice cloth or canvas put up in place in chute fourteen above the first crosscut have caused to circulate at the working place of the deceased air circulating in the crosscut at its intersection with said chute on the day he was found dead at his working place? Answer: Yes, providing no coal was in the chute.

"7. Was there as much air circulating at the place where the first crosscut intersects chute fourteen as there was circulating at the working place of David Steel in chute thirteen on the day of the death of the deceased? Answer: No.

"8. Was there sufficient air circulating at the working place of David Steel in chute thirteen to sustain the life of a man working as a miner in the defendants' mine on

Nov. 1902.] Opinion of the Court.—REAVIS, C. J.

the day of the death of the deceased? Answer: Yes, at the intersection of thirteen chute and third crosscut.

"9. Was there on the day of the death of the deceased a circulation of air at the place in the first crosscut where it intersects chute fifteen sufficient to sustain the life of a man working as a miner in defendants' mine? Answer: Yes, some, but not enough to sustain life.

"10. Did the man-way in chute fourteen between the gangway and the first crosscut admit air to the first crosscut at its intersection with chute fourteen, on the day of the death of the deceased? Answer? Yes.

"11. Was it the duty of the deceased to report to the defendant or any of their agents the fact of any working place of the deceased becoming filled or clogged with coal so as to prevent the circulation of air? Answer: No.

"12. Could the deceased have detected by the action of his lamp the presence of black damp at his working place in the defendants' mine? Answer: No, he was not competent.

"13. Could the deceased have seen powder smoke arising from blasts at his working place in defendants' mine? Answer: Yes.

"14. Was deceased suffocated by powder smoke at his working place in defendants' mine? Answer: No.

"15. Was deceased suffocated by black damp at his working place in defendants' mine? Answer: Yes.

"16. Under the circumstances might the death of the deceased at his working place in defendants' mine have been caused otherwise than from suffocation by powder smoke, black damp or poisonous gases? Answer: No.

The jury returned a general verdict for respondent, and assessed the damages at \$14,000.

1. Eighteen assignments of error are made by appellants. The substance of these will be considered, without further reference to their numbers. A motion for nonsuit for insufficiency of the evidence was made after all the plaintiffs' evidence was offered, and a motion for a

verdict for defendants was made at the conclusion of all the testimony in the case. The oral evidence here extends over 300 pages of the record. It is not within the permissible limits of an opinion to set forth the evidence, and no brief review could be satisfactory. The testimony has been examined upon the exception to its sufficiency, and our conclusion is that substantial evidence supports the verdict. The answers to the special interrogatories are not inconsistent with the general verdict.

2. In giving instruction No. 4, the court quoted the statute (§3165, Bal. Code), as follows:

“The owner, agent or operator of every coal mine, whether operated by shafts, slopes or drifts, shall provide in every coal mine a good and sufficient amount of ventilation for such persons and animals as may be employed therein . . . and said air must be made to circulate through the shafts, levels, stables and working places of each mine.”

The instruction continues:

“The purpose of this law is to provide a reasonably safe place for the men to work in, and that the ventilation at the working places of the men shall be such as to maintain them reasonably safe from dangerous gases by a good and sufficient ventilation of the mine. This is a positive duty imposed on the operator and owner of the mine, and for the neglect of this duty the law holds such operator and owner liable, if damages result therefrom.”

No error is perceived here. No pertinent facts had been shown, making any duty of the mine inspector before the accident material. The instruction is substantially approved in *Costa v. Pacific Coast Co.*, 26 Wash. 138 (66 Pac. 398). The fifth instruction was as follows:

“I charge you further that the degrees of care required of an operator of a coal mine and of the workmen em-

Nov. 1902.] Opinion of the Court.—REAVIS, C. J.

ployed by them in underground work differ. The care required of the operator, as you have been instructed, does not apply to the workmen as to the methods of work in the operation of the mine. The miner or workman assumes only such risks and dangers therefrom as are open and apparent to him, or one in his position, and which are necessarily incident to his employment."

This instruction apparently relates to the risk assumed by the miner. The court had already correctly instructed upon the degree of care required of the operator in furnishing safe appliances and performing the duty of inspection, and here defines the risk assumed by the miner. See *Myrberg v. Baltimore & S. M. & R. Co.*, 25 Wash. 364 (65 Pac. 539); *Shannon v. Consolidated Mining Co.*, 24 Wash. 119 (64 Pac. 169). The consideration of the assignment upon this instruction may be applied to, and disposes of, the exceptions to the other instructions upon the assumption of risk. The eighth instruction given was as follows:

"I charge you further that the positive duty of keeping a good and sufficient ventilation in the mine being on the defendants, as you have been instructed, it matters not who or what persons performed work or assist in the work of ventilation. If you should find that it was necessary to keep chute No. 15, or any other chute, open as an airway in order to have a good and sufficient ventilation in chute 14 above the first crosscut, and that part of the duty of the loader was to keep chute 15 clear, then in that respect, in performing that particular work, he was assisting in performing a positive duty of the defendants to the deceased, and was, as to that work, a vice principal of the defendants, and not a fellow workman of the deceased."

This is within the principle announced in *Costa v. Pacific Coast Co.*, *supra*. Instruction No. 10, which is, in substance, that the defendants are liable, though the act

of a fellow servant concurred in producing the injury, is also approved by several expressions of this court. See *Costa v. Pacific Coast Co.*, *supra*.

The instructions upon the defense of contributory negligence clearly stated the law, as did also those relating to the duty of inspection in connection with the exercise of reasonable care in the operation of the mine, and upon the whole case the instructions were equally as favorable to defendants as to plaintiffs.

Evidence was received, over the objection of the defendants, from several experienced miners, to the effect that about the time of the death of deceased the chute in which he was working contained bad air and was insufficiently ventilated, and that complaint on account of such conditions was made to the managers before the accident. This seems pertinent for the purpose of showing notice of such conditions to the operators. Exceptions were also taken to some expressions of experienced miners who were allowed to testify to conclusions in the nature of expert evidence. This was permitted upon a showing of competency deemed satisfactory by the superior court. Such evidence is peculiarly within the discretion of the trial court, and we can see no abuse thereof in the present instance. The issues at the trial were chiefly, if not solely, questions of fact; and, as the instructions properly submitted such facts to the jury, its verdict must be conclusive.

3. Some time after the rendition of the verdict defendants moved for a new trial on the ground that one of the material witnesses for plaintiffs, who testified at the trial, was at the time insane, or of such mental unsoundness as to render him incompetent, and that, in any view, his unsoundness of mind was such as to require caution-

Nov. 1902.] Opinion of the Court.—REAVIS, C. J.

ary instructions to the jury in weighing his testimony. It was shown that such mental condition of the witness was unknown to defendants at the time of the trial. The question of the mental soundness of the witness was heard upon evidence produced before the court. The court, in substance, found that the witness was subject to certain hallucinations, and that insanity had been hereditary in his family, and further found that witness at the trial was capable of making an intelligent and connected statement, that his testimony did not indicate insanity or mental aberration at the time, and that, if the fact of his mental infirmity as shown on the motion for new trial had been known at the trial, no instructions to the jury relating thereto would have been necessary. The testimony of the witness as it appears here is clear and intelligent. He was subjected to an exhaustive cross-examination, and, from his whole testimony, no indication is given of any mental aberration. The superior opportunities of the trial judge enable him to form a better conclusion as to the mental competency of the witness than are presented here. We are content to accept the conclusion that the witness was competent.

It is also urged that the damages assessed by the jury are excessive. There is no indication of passion or prejudice of the jury in the trial, and the evidence showing the damages is not insufficient to sustain the conclusion.

Upon the whole record, the judgment must be affirmed.
DUNBAR, FULLERTON, MOUNT and ANDERS, JJ., concur.

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[No. 4478. Decided November 8, 1902.]

MARGARET JORDAN, *Respondent*, v. CITY OF SEATTLE,
Appellant.

TRIAL — WRONGFUL EXCLUSION OF EVIDENCE — HOW CURED.

Error cannot be predicated upon the exclusion of testimony, where the excluded matter is subsequently permitted to be put in evidence.

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS — PERSONAL INJURIES — SCOPE OF CROSS-EXAMINATION.

In an action to recover damages for injuries to plaintiff's leg caused by a defective sidewalk, where she has testified on direct examination merely that it cost her \$15 per month for medicine to swathe her leg, it was not error to refuse to allow cross-examination as to medical advice given by her physician.

SAME — KNOWLEDGE OF DEFECT.

The knowledge of plaintiff of a safer way around is immaterial in an action for injuries occasioned by a defective sidewalk, since a person has a right to travel upon the streets and walks of a city by the most direct course.

SAME — DISEASE AUGMENTING INJURY.

One whose negligence occasions a personal injury to another is liable for the proximate consequences of his act, although these consequences may be aggravated and augmented by reason of the delicate health or organic tendency to disease of the person injured.

TRIAL — EXCLUSION OF EVIDENCE — HARMLESS ERROR.

The exclusion of testimony as to what would be a reasonable fee for curing plaintiff's injuries was not prejudicial error, where no doctor's fees were claimed by plaintiff and none were incorporated in the judgment.

NEW TRIAL — REFUSAL TO GRANT — ABUSE OF DISCRETION.

The refusal of a new trial on the ground of newly discovered evidence in the shape of witnesses who had lived in the same house with plaintiff and knew her condition, was not an abuse of the court's discretion, where the case had been pending a couple of years before the trial, had been tried once before about a year prior to the second trial, and no effort had been made during all that time to procure the testimony of such witnesses.

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

EXCESSIVE DAMAGES.

A verdict for \$6,090 for injuries to plaintiff's leg will not be disturbed as excessive, where there was testimony that ulcerations caused by the injury were permanent and that the plaintiff would probably be partially disabled for life.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Affirmed.

Mitchell Gilliam and William Parmerlee, for appellant.
J. P. Ball and I. D. McCutcheon, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal from a judgment rendered in the superior court of King county on the 2d day of January, 1902, in favor of respondent and against appellant, in the sum of \$6,090, for personal injuries alleged to have been sustained by the respondent by reason of a defective sidewalk. This case was heretofore before this court, and was decided September 5, 1901. 26 Wash. 61. In the former trial, on the challenge to plaintiff's evidence, the case was taken from the jury, and the cause dismissed, for the reason that the evidence showed contributory negligence on the part of the plaintiff. Upon appeal the case was reversed, this court holding that whether, under the circumstances as shown by the testimony, the plaintiff was guilty of contributory negligence was a question for the jury, and upon a new trial the result was as above indicated. It is contended by the appellant that the court erred in denying appellant's motion for a nonsuit; that the case presented by the record on this appeal is much stronger in favor of appellant than upon the former appeal. It is not necessary to again discuss the evidence in this case, for a comparison of the record on the present appeal with that on the prior appeal

convinces us that there was no substantial difference in the testimony offered by the plaintiff in the two different trials. Therefore the court did not err in denying appellant's motion for a nonsuit.

The second assignment is that the court erred in sustaining an objection to the following question: "I will ask you what physician, if any, has treated your leg since the time of the last trial." No page of the transcript is referred to by the appellant in its brief, but an examination of the record shows that the question upon which this assignment of error is based was answered by the plaintiff. On page 37, after some discussion between the attorneys on this proposition, the question was asked: "What physician, if any, besides the one you have mentioned, Dr. Bolink, has examined your leg with reference to giving you treatment for it; and from what physician, if any, have you received treatment for your leg, besides the one you mentioned?" Answer: Dr. Bolink has been treating it since the—" Question: "I say except Dr. Bolink." Mr. McCutcheon, counsel for the plaintiff, here intervened as follows: "The question involves this,—as to whether he is the only one." To which the witness answered: "Yes, sir, he is the only one that has treated it." Then the question by counsel for the defendant: "He is the only one that has treated your leg?" Answer: "Yes, sir." Question: "Or examined it for the purpose of treatment?" Answer: "Yes, sir." We think this excerpt from the testimony disposes of this assignment.

Again it is alleged that the court erred in sustaining an objection to the following question, on page 48 of the transcript: "Did not he (Dr. Bolink) also tell you at that time that the only way that you could cure that leg would be to go to the hospital and rest,—keep off your feet, and

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

then it would get well?" This was properly rejected as not being proper cross-examination. It is stated by counsel for the appellant in its brief that respondent had testified in her direct examination of her visit to Dr. Bolink for the purpose of getting a prescription, and a part of the conversation had between her and the doctor. Again the page of the record where such statement is found is not referred to, but we have examined the testimony of the plaintiff in chief carefully, and no such testimony appears. In fact, she did not testify concerning any conversation with Dr. Bolink, or any other doctor. She simply stated that it cost her \$15 a month for medicine to swathe her leg with. The testimony that is ascribed to her by the counsel was drawn out by him on cross-examination.

The third assignment is that the court erred in sustaining the objection to the following question: "Mrs. Jordan, you knew that there was a way from your house by crossing,—by going up a short distance and crossing over and walking over on the opposite side of the street; that there was a walk there that was not broken up or in any bad shape, but perfectly safe, didn't you?" This question was properly rejected as not being material. Had it been material, it would have been a defense to this action, if this knowledge could have been traced to the plaintiff. But this court has decided many times, in common with all other courts, that a resident of a city has a right to travel upon its streets and walks, and has a right to travel the most direct course. This question was really passed upon under the allegation of contributory negligence made in the previous case.

There is also assigned as error the action of the court in sustaining an objection to the following question asked

Dr. Newland, a witness in behalf of the appellant: "What, in your opinion, would be a reasonable fee for a physician for his services performed for the purpose of effecting a cure?" This error, if error it was under any circumstances, is without prejudice here, for no doctor's fees were claimed in the trial of the cause, and none were allowed by the court or are incorporated in the judgment.

On the question of whether the disease was permanent or not there was a conflict in the testimony which went to the jury. The 10th, 11th, and 12th instructions are as follows:

"If the jury believe from the evidence that plaintiff was injured through the negligence of defendant, and that, at the time of the injury, plaintiff was suffering from a varicose condition of the veins in the lower part of the left leg, and that such injury aggravated, augmented, and accelerated such varicose condition, and the suffering occasioned thereby, then your verdict will be for the plaintiff, unless you find that these conditions, not only might have arisen, but must have arisen, if the negligence of the defendant (if you find it negligent in the premises) had not intervened. If the original act of the defendant was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which were not wrongful, the rule is that the injury shall be referred to the wrongful cause,—pass by those which were innocent. If one is reasonably responsible for the act, he is chargeable for direct result of the act, however surprising. The rule is, if by reason of delicate condition of health the consequences of a negligent injury are more serious still, for those consequences the defendant is liable, although they are aggravated by imperfect bodily conditions.

"The duty of caring and of abstaining from the unlawful injury of another applies to the sick, the weak, the

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

infirm, as fully as to the strong and healthy; and when the duty is violated the measure of damages is for the injury done, even though the injury might not have resulted but for the peculiar physical condition of the person injured, or may have been augmented thereby. The proximate cause of an injury is the efficient cause; the one that necessarily sets the other cause in motion.

"The public streets and sidewalks in a city are not constructed and maintained for the sole use of the healthy and robust people, but for the use of the infirm, the sick, and decrepit, as well. They may lawfully be traveled by every citizen, without regard for age, sex, or physical condition. If the city negligently permits such streets and sidewalks to remain out of repair, and any person (who is himself free from negligence) is injured, the city is liable for the injury. The city is chargeable with the knowledge that people of different bodily conditions travel its streets, and that among these are the weak, the decrepit, and those with organic predisposition to disease. It is reasonable to expect that in certain cases, if an injury happens to one of the latter class, full recovery therefrom may be retarded or prevented by such predisposition or tendency to disease. The city is chargeable with knowledge that all classes of persons, including both the healthy and diseased, together with such as are afflicted with tendency to disease, constantly travel its streets and sidewalks, and that such tendency to disease might greatly aggravate a bodily injury. Hence the city has reasonable grounds to expect that if one of that class, who are diseased, or afflicted with a tendency to disease, is injured by reason of a defect in the sidewalk or street, the disease might develop, and greatly retard and perhaps prevent a cure of it. Hence, if you find that the plaintiff in this action had a tendency to varicose veins in the lower part of her left leg, that she was injured as she alleges, that the defendant negligently permitted the defect in the sidewalk in controversy to remain in such condition as to bring about her injury, then and in that case I charge you that the negligence of the defendant was the proximate cause of

the whole injury, for which the plaintiff seeks to recover damages, unless you find that the plaintiff was guilty of such degree of negligence as contributed to her own injury."

Such instructions are assigned as error, but no cases are cited in support of this contention; and we think that the instructions are sustained by the great weight of, if not by universal, authority. In *Louisville & N. R. R. Co. v. Jones*, 83 Ala. 376 (3 South. 902), it was held that if the plaintiff's intestate, at the time she received the injuries complained of, was afflicted with an incurable disease which would have caused her death in the course of time, but that her death was hastened by the injuries received, the railroad would be liable. The same, in substance, was held in *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163 (15 N. W. 65, 45 Am. Rep. 30), citing *Baltimore & P. R. R. Co. v. Reaney*, 42 Md. 117, where the court said:

"But it is equally true that no wrong-doer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense, that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act."

In *Tice v. Munn*, 49 N. Y. 621, it was held that one whose negligence has occasioned a personal injury to another is liable for the proximate consequences of his act, although these are aggravated by reason of the delicate health of the person injured; that the liability is not limited to such consequences of the injury as would have resulted if the person had been in good bodily health.

"If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent." Cooley, *Torts* (2d ed.), p. 76, par. 3.

It was held in *St. Louis, etc., Ry. Co. v. Ferguson* (Tex. Civ App.), 64 S. W. 797, that a railroad company was liable in allowing a car to collide with a train, though such collision would not have injured an ordinary passenger, and the company or its agent had no knowledge of the passenger's condition. In *Laplein v. Steamship Co.*, 40 La. An. 661 (4 South. 875, 1 L. R. A. 378), it was held that the duty of care and of abstaining from the unlawful injury of another applies to the sick, the weak, the infirm, as fully as to the strong and healthy; and when the duty is violated the measure of damages is the injury done, even though such injury might not have resulted but for the peculiar physical condition of the person injured, or may have been aggravated thereby. In *Stewart v. Ripon*, 38 Wis. 584, there was some evidence that the diseased condition of the plaintiff's arm, following the accident, was aggravated by an organic scrofulous tendency on his part; and it was held that, if the diseased condition of plaintiff's arm would not have occurred but for his organic tendency to scrofula, still plaintiff's negligence must be regarded as the proximate cause of the whole injury. Many of the instructions complained of are taken from this case. This question was also practically passed upon by this court in *Clukey v. Seattle Electric Co.*, 27 Wash. 70 (67 Pac. 379). We think no error was committed by the instructions given.

Appellant also complained that the court erred in overruling its motion for a new trial on the ground of newly discovered evidence. The affidavits show that the affiants lived for several months after the date of the alleged accident in the same house with respondent; that during said

time they saw the respondent daily, and she made no complaint of injury, was not sick or lame, or confined to her house. It is true, as appellant says, that this evidence would have had an important bearing upon the case if it had been known at the time of the trial. But we think, under all the circumstances of this case, considering that the case had been tried once before nearly a year prior to such trial, that the claim for damages had been presented to the city a year before the first trial, and that no effort had been made during all that time to inquire of persons living at the house where the plaintiff lives, the court did not abuse its discretion in overruling the motion upon that ground.

It is also earnestly contended that the verdict is excessive, and shows passion and prejudice on the part of the jury. It seems difficult to understand why jurors should entertain passion and prejudice against a city, and there is no proof in the record of the existence of such feeling, except it may be furnished by the size of the verdict. On its face, it seems to this court an excessive verdict, but sufficient testimony went to the jury that the ulcerations formed by reason of this accident were permanent, and that the plaintiff was partially disabled, and probably would be for life; and this, in connection with the fact that an exhibition of the affected parts of the plaintiff was made to the jury, and that they had a better opportunity to determine the malignity and baleful effect of the injury than this court, prevents us from reaching a conclusion that the verdict was prompted by passion or prejudice, and from interfering with the discretion of the jury in that regard.

The judgment is affirmed.

REAVIS, C. J., and ANDERS, MOUNT and FULLERTON, JJ., concur.

Nov. 1902.]

Syllabus.

[No. 4241. Decided November 12, 1902.]

**A. L. SMALLEY et al., Respondents, v. GEO. F. LAUGENOUR
et ux., Appellants.**

30	307
32	98
332	458
33	546
30	307
336	563
30	307
42	538

APPEAL — NOTICE — PARTIES.

A defendant who disclaims any interest in the subject-matter of an action is not a necessary party to an appeal from the judgment therein, and therefore need not be served with notice of appeal.

SAME — TO WHOM ADDRESSED.

The statutory provision requiring notice of appeal to be served on all parties who have appeared in the action does not require that the notice shall be directed to all parties who have appeared, but it is sufficient if the notice be directed to the prevailing parties.

SAME — SERVICE BY ATTORNEY FOR APPELLANT UPON PLAINTIFF AS ATTORNEY FOR ANOTHER PARTY.

The fact that attorneys for appellants are also attorneys for one of the other parties to the action would not debar their serving themselves with notice of appeal as attorneys for such client not appealing, when there is nothing in the record showing a conflict of interest between their clients.

JUDGMENTS — RES JUDICATA — AWARD OF EXEMPTIONS IN BANKRUPTCY.

A judgment of a bankruptcy court that certain property of the bankrupt was exempt from his debts is *res judicata* in an action of ejectment brought by the purchaser of such property at execution sale upon a judgment against the bankrupt.

BANKRUPTCY — JURISDICTION OF COURT AND OF TRUSTEE.

Although the United States bankruptcy act makes it the duty of the trustee in bankruptcy to set apart the bankrupt's exemptions, such duty is merely ministerial, and the power to make an order setting apart to a bankrupt certain property as exempt is vested by the same statute in the bankruptcy court.

SAME — POWER TO SET APART EXEMPTIONS.

A bankrupt being obligated to schedule all his property in his petition for bankruptcy—that claimed as exempt as well as that not so claimed—the bankruptcy court has jurisdiction to pass upon the character of all his property, and set apart the exemptions allowed by law.

Opinion of the Court.—FULLERTON, J. [30 Wash.**SAME — RULES OF SUPREME COURT.**

The supreme court being empowered by the bankruptcy act to prescribe all necessary rules for carrying it into effect, and having provided by rule that no trustee need be appointed in certain cases, the failure to appoint a trustee under such circumstances would not affect the jurisdiction of the bankruptcy court to make a valid order with reference to the bankrupt's exempt property.

SAME — PRESUMPTIONS AS TO VALIDITY OF PROCEEDINGS.

Where the trial court found that an order of the bankruptcy court setting apart property as exempt was "regularly made," it cannot be objected on appeal that the order was made without notice to the creditors, there being nothing in the record rebutting the presumption that all the necessary steps were taken to give it validity.

SAME — JUDGMENT OF COURT — RELATE BACK TO FILING OF PETITION.

A judgment in the bankruptcy court relates back to the institution of the bankruptcy proceedings, and, where it had adjudged certain property exempt from debts as a homestead, a sale in the state courts of such property under execution was void, although the execution sale was prior to the award of exemption in bankruptcy, but subsequent to the initiation of the proceedings.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Reversed.

Crow & Williams, for appellants.

Myers & Warren, for respondents.

The opinion of the court was delivered by

FULLERTON, J.—This was an action of ejectment, brought by the respondents against the appellants and defendants to recover the possession of certain real property situated in Lincoln county, in this state. The action was tried by the court without a jury. The findings of fact are accepted by both sides as correct, and the cause is here on the question whether the proper judgment was entered upon the findings.

The findings of fact material to the inquiry are substantially these: The appellants are husband and wife,

Nov. 1902.] Opinion of the Court.—FULLETON, J.

and acquired the land in controversy as early as the year 1885. On March 16, 1895, the respondents and one L. J. Hutchings, as partners, recovered a judgment in the superior court of Lincoln county on a community debt against the appellant Geo. F. Laugenour for the sum of \$363.45. On April 12, 1899, execution was issued on the judgment, and levied on the land mentioned, under which, after due advertisement, it was sold at public auction to the respondents for the sum of \$532.15, being the amount then due on the judgment. Thereafter the sale was confirmed by the court, and, after the time for redemption had expired, a sheriff's deed was executed and delivered to the purchasers, which they caused to be recorded. On May 10, 1899,—three days before the execution sale took place,—the appellant Geo. F. Laugenour filed in the United States district court for the district of Washington, his voluntary petition in bankruptcy, in the schedule to which he listed the land in controversy, claiming the same as exempt under the bankruptcy act. On May 11, 1899, the referee in bankruptcy, to whom the proceedings had been referred, adjudged the petitioner a bankrupt, and thereupon gave to the creditors of the bankrupt, shown in the schedule attached to the petition, among whom were the respondents, the formal notice required by the bankruptcy act, notifying them of the adjudication of bankruptcy, of the time and place fixed for the first meeting of the creditors, that they might attend at such meeting, prove their claims, examine the bankrupt, and transact such other business as should properly come before the meeting. None of the creditors appeared at the time fixed for the meeting, viz., June 5, 1899, and no trustee was elected or appointed; the referee finding that no necessity existed therefor. On August 9, 1899, the bankruptcy

court entered an order discharging the bankrupt from all debts and claims made provable against the bankrupt's estate, and on August 12th "regularly made an order in said bankruptcy proceedings setting aside to said bankrupt, as exempt under the act of congress relating to bankruptcy, the real estate hereinbefore described, and awarding said real estate to the said bankrupt." The court further found that since the execution sale the appellants had been in possession of the real estate, claiming to be the owners of the same, and for several years last past had resided in Spokane county, Washington, and that the real property, during the time, had been occupied by the defendant Harry Gilliland, as their tenant. On the facts so found it ruled that the respondents were the owners and entitled to the possession of the premises, and entered judgment accordingly.

The respondents move to dismiss the appeal, assigning as reasons therefore: (1) That the notice of appeal is insufficient; (2) that the notice of appeal given was not served on the defendants Green and Gilliland; and (3) that the appeal bond was not filed in time. The contention that the notice of appeal is insufficient is based upon the fact that it is not directed to the defendants Green and Gilliland, each of whom appeared in the action; the former by filing an answer disclaiming any interest in the subject-matter of the action, and the latter by setting up a leasehold interest expiring at a fixed time. It is said that because these parties had appeared in the action, and did not join in the notice of appeal, it was necessary to serve the notice of appeal on them; and that a notice of appeal not directed to a party, whether served on him or not, is ineffectual to bring that party before the appellate court. The defendant Green, having answered, disclaiming interest,

Nov. 1902.] Opinion of the Court.—FULLETON, J.

was neither a necessary nor a proper party to the appeal, and service of notice upon him was unnecessary. *Watson v. Sawyer*, 12 Wash. 36 (40 Pac. 413). The interest of the defendant Gilliland in the premises, as shown by his answer, had expired before the trial of the action, and the judgment against him was to the effect that he had no interest, and it may be seriously questioned whether it was necessary to serve him with the notice of appeal at all. But conceding that it was, we cannot agree that it was necessary that the notice be directed to him. The statute relating to notices of appeal does not, in terms, provide that it shall be directed to anyone. To appeal is not to institute an original proceeding, nor is the notice in any sense a summons or a writ to bring parties before the court. It is a notice, and nothing more. It would seem, therefore, that when the notice is properly entitled as of the action in which the appeal is taken, and informs the parties to the action who the appellants are, and the judgment or part of the judgment appealed from, it complies with all the requisites of a proper notice, and, consequently, with the directions of the statute. But if it be said the statute implies the requirement that the notice of appeal be directed to any of the parties, it is sufficient if it be directed to the prevailing parties. Two methods of giving notice of appeal are provided by the statute. The notice may be given orally in open court at the time the judgment or order appealed from is rendered or made, in which case the judge shall direct the clerk to make an entry of such notice in the journal of the court, or, "if the appeal be not taken when the judgment or order appealed from is rendered or made, then the party desiring to appeal may, by himself or his attorney, . . . serve written notice on the prevailing party or his attorney that he appeals from such judg-

Opinion of the Court.—FULLERTON, J. [30 Wash.

ment or order," Bal. Code, § 6503. A subsequent section (Id. § 6504), provides that all parties whose interests are similarly affected may join in the notice of appeal, and that any such party who has not joined in the notice when given may do so within ten days after the notice is served on them by filing a statement to that effect with the clerk of the superior court, or may within that time serve an independent notice of appeal; further providing that, when a notice of appeal is not given at the time the judgment or order appealed from is rendered or made, it shall be served on all parties who have appeared in the action. It is plain, however, that the purpose of this is not to make such parties parties to the appeal, but is for the purpose of giving them an opportunity to become such should they so desire. There can, then, be no implied requirement that the notice be directed to them. Here the notice was directed to the prevailing parties, and we hold it sufficient as a notice of appeal.

It appears that the attorneys representing the appellants also represented the defendant Gilliland in the court below. On taking the appeal they acknowledged service of the notice thereof on themselves as attorneys for Gilliland, and it is contended that this is sufficient to show a service of the notice on that defendant. If the service was insufficient, it is because the attorneys representing Gilliland in the court below were without authority to represent him on the appeal, and this want of authority must be gathered from the mere fact that they are the attorneys representing the appellants. But is this fact of itself sufficient to show a want of authority? We think not. Unless there is a conflict of interest between this defendant and the appellants, the same counsel can with propriety represent the interests of both; and, as the record shows no conflict of interest, it will not be presumed that any such exists.

Nov. 1902.] Opinion of the Court.—FULLETON, J.

The third ground of the motion is rendered pointless by the supplemental transcript sent up by the appellants. The motion to dismiss is denied.

Passing to the merits of the controversy, it is at once obvious that the correctness of the judgment of the trial court must depend upon the effect that is given to the order of the bankruptcy court setting apart to the bankrupt the property in question as property exempt from the claims of his creditors. It will be remembered that the statute of this state permits a head of a family to select from his or her real property a homestead of a limited value, and exempts the same from the liens of general judgments, and from execution or forced sales thereunder. (Ballinger's Code, § 5214 *et seq.*); that the selection may be made at any time before sale (*Wiss v. Stewart*, 16 Wash. 376, 47 Pac. 736); and that an execution sale thereof after such selection is ineffectual to pass title to the purchaser (*Wiss v. Stewart, supra*; *Asher v. Sekofsky*, 10 Wash. 379, 38 Pac. 1133). If, therefore, the property in question was exempt from execution at the time the sale was made under the execution issued on the respondents' judgment, the respondents acquired no title thereto by their purchase at the execution sale, and consequently have no title on which they can maintain the present action. Now, the appellants were at liberty to establish this fact in one or both of two ways,—they could plead and prove facts showing the property to have been exempt from execution at the time of the sale, thus making the question directly an issue in the state court, or they could plead and prove that the question had been once adjudicated between the parties in a court of competent jurisdiction, having the parties and the subject-matter before it. The appellants chose the latter method. They sought to show

that the property was exempt by showing that a bankruptcy court, having jurisdiction of the person and estate of the appellants, in a proceeding in bankruptcy in which the respondents' judgment was provable, had awarded the property to the appellants as property exempt from the claims of his creditors. As this order related back to the time of the institution of the bankruptcy proceedings, it is *res judicata*, if it has the force of *res judicata* at all, that the property was exempt from sale at the time sale thereof was made, and hence an adjudication that the sale was void.

Why has not the order the effect of *res judicata* between the parties as to the status of the property at the time of the institution of the bankruptcy proceedings? The respondents suggest several answers, and, as these involve the whole question, we will discuss them in order.

It is first said that the order is invalid because it was made by the judge of the court, while § 47, cl. 11, of the bankruptcy act (30 St. at Large, 557), makes it the duty of the trustee to "set apart the bankrupt's exemptions." The order here in consideration was made by the judge of the bankruptcy court while in the exercise of his judicial functions, and is the order of the bankrupt court. By § 2, cl. 11, of the bankruptcy act, the bankruptcy court is expressly vested with jurisdiction "to determine all claims of bankrupts to their exemptions, and by cl. 15 of the same section the court has jurisdiction to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of" the act. The first of these clearly confers upon the bankruptcy court power to determine what property of the bankrupt is and what is not exempt property, and the

Nov. 1902.] Opinion of the Court.—FULLERTON, J.

second clause just as clearly confers the power to make such orders as the court may find necessary to enable the bankrupt to become possessed of the property the act allows to him as exempt. On the other hand, the duties of the trustee with reference to the bankrupt's exempt property are ministerial. While he is authorized by the act to set aside the bankrupt's exemptions, he cannot determine disputed questions arising over the right to exemptions. Nor are his acts with relation to exemptions, where there is no dispute, in any sense final. He is obliged to report his doings to the court, and certainly the court can and would of its own motion correct his abusive acts, however the same might be called to its attention. There can be, therefore, it seems to us, no question as to the power of the bankruptcy court to make an order setting apart to a bankrupt certain property as exempt.

It is next said that, conceding the property to have been exempt, the title thereto would not have vested in a trustee, and the bankruptcy court would have no jurisdiction over it. Aside from the fact that such a concession would seem to be fatal to the respondents' title, as the property was not subject to execution sale if exempt, we cannot think the conclusion sound. The bankrupt is obligated to schedule all of his property in his petition in bankruptcy,—that which he claims as exempt as well as that to which he makes no such claim,—and it is the duty of the bankrupt court to determine and set apart to him the exemptions allowed by law. Clearly, the property is subjected to the jurisdiction of the court, no matter in whom the legal title thereto may be said to rest. To contend differently is to contend that the court's order is a valid and binding adjudication when it decides that the property is not exempt, but a mere nullity when the decision is otherwise.

However inconsistent the language of the act may be, it certainly did not contemplate such an absurdity as this. The clause of the bankruptcy act vesting in the trustee the title to all the bankrupt's estate "except in so far as it is to property which is exempt" was intended, it seems to us, to do away with the necessity of a conveyance from the bankrupt to the trustee, and nothing more; it was not intended to deny to the bankruptcy court the power to make valid orders with reference to all or any of the bankrupt's property, whatever may be its character, or whether the title may be in the bankrupt or the officer of the court.

Again, it is said that because in this case no trustee was appointed the court was without power to make a valid order with reference to the bankrupt's exempt property. What we have said in answer to the last objection would seem to answer this, but there is an additional reason why the contention is unsound. The bankruptcy act (§ 30) expressly empowers the supreme court of the United States to prescribe all necessary rules for carrying the act into force and effect, and that court has, by rule XV., empowered the bankruptcy court to direct that no trustee be appointed where the schedule of a voluntary bankrupt shows no assets, and no creditor appears at the first meeting; using the term "assets" evidently in the sense that there is no property available to the payment of the claims of the creditors or the expenses of the trustee, not that there is absolutely no property. See *In re Levy*, 101 Fed. 247. This rule, if valid, is as much a part of the bankrupt act as is any section or clause of that act; and, unless it is to be held that the supreme court exceeded its powers in the announcement of the rule, it cannot be held that the appointment of a trustee is necessary in order to enable the court to make a valid order with reference to exempt property.

Nov. 1902.] Opinion of the Court.—FULLERTON, J.

No reason is suggested why the rule is not within the legitimate powers of the supreme court, and, as we perceive none, we cannot but hold the ruling of the bankruptcy court to the effect that there was no necessity for the appointment of a trustee in the proceedings in question a valid order in no way affecting its other powers.

Again, it is said that the order setting apart the property as exempt was made without notice to the respondents and hence has no force as against them. To this it is a sufficient answer to say that the record does not bear out the fact here assumed. The trial court found that this order was "regularly made," which presumes that all of the necessary steps were taken to give it validity, if it was within the power of the court to make it.

Lastly, it is said that the order of the court setting apart the property as exempt does not purport to, nor does it in law, affect existing liens upon the property set apart as exempt, and, unless the liens thereon be such as the law avoids of its own force, such liens may be enforced in the state court against and to the extent of the property affected by the lien, notwithstanding the order setting it apart as exempt and the discharge of the debt in bankruptcy. In cases of liens which can exist independent of the question whether or not the property is exempt, undoubtedly the rule here invoked would be applicable; but the lien of a general judgment is not such a lien. It is a lien upon real property, only, which is not exempt. Hence, if this property was exempt at the time of the filing of the petition in bankruptcy, the judgment under which it was sold was not a lien thereon, and to assume that the judgment was a lien is to assume that it was not exempt,—the very question at issue. It must be borne in mind that the order of the bankruptcy court related back to the time

of the filing of the petition in bankruptcy, and is a judgment of that court that the property was exempt at that time, and is, in its effect, a judgment that the respondents' judgment was not a lien on it. This being so, it cannot be said that it was set apart subject to a lien, or that the question whether the judgment of the respondents was or was not a lien on it was left open to investigation in the state courts.

The conclusion must follow, therefore, that the order of the bankruptcy court was an order of a court of competent jurisdiction, having the parties and the subject-matter before it. As such it is conclusive between the parties of the question decided. This question was that the real property in dispute was exempt from execution at the time the respondents attempted to sell it upon their judgment. The sale was, for that reason, void, and the appellants entitled to the judgment prayed for in their answer.

The judgment is reversed, and the cause remanded, with instructions to enter a judgment for the appellants in accordance with the prayer of the answer.

REAVIS, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4360. Decided November 12, 1902.]

ALEXANDER McNICOL, *Appellant*, v. EDWARD COLLINS *et al.*, *Respondents*.

DECEIT — SALE OF CORPORATE STOCK — EVIDENCE — FORMER VALUES.

In an action for damages for the difference between the selling price and the actual value of corporate stock, which plaintiff alleged he had been fraudulently induced to sell at less than its real

Nov. 1902.] Opinion of the Court.—MOUNT, J.

value, evidence is inadmissible for the purpose of showing at what prices stock had been sold two years prior to the sale in question.

SAME.

Where deceit in the sale of corporate stock was charged against defendants, evidence of the purchase price of the stock two years before, at the time it was purchased for plaintiff by one of the defendants, was admissible, in connection with testimony that plaintiff had agreed to divide the stock with such defendant at the purchase price, in order to rebut the charge of deceit.

SAME — WAGES OF EMPLOYEES.

The amount of wages paid employees by a corporation is irrelevant for the purpose of establishing the value of its shares of stock.

SAME — CROSS-EXAMINATION.

Where plaintiff, in order to show confidential relations existing between himself and one of the defendants in an action founded on deceit had testified to their joint ownership of a building, it was not error to permit defendant to testify more fully upon the subject, although not involved in any way in the subject-matter of the action.

EVIDENCE — CONVERSATIONS.

Conversations had by witnesses in regard to the subject-matter of an action are inadmissible when not had in the presence of the party sought to be charged thereby.

APPEAL — PREJUDICIAL ERROR.

Where prejudicial errors of law occur upon a jury trial, it is the duty of the supreme court to reverse the case, though the court thinks it is decided correctly upon the facts in evidence.

Appeal from Superior Court, Pierce County.—Hon.
THAD HUSTON, Judge. Reversed.

A. R. Titlow, for appellant.

John C. Stallcup, for respondents.

The opinion of the court was delivered by

MOUNT, J.—This is an action for damages for the difference between the price for which appellant sold 33 shares of the capital stock of the Valley Mill Company

and the actual value thereof at the time of sale, which is alleged in the complaint to be \$350 per share. Appellant was the owner of 33 shares of stock in the Valley Mill Company. On October 17, 1900, he agreed to sell these shares, together with 19 other shares belonging to relatives, to one Hanson at the price of \$100 per share. At that time a written contract was entered into by appellant and Hanson, by the terms of which Hanson paid \$50 down and was to have until December 1, 1900, in which to pay the balance and receive a transfer of the shares. If the balance was not paid on or before December 1st, Hanson was to forfeit the \$50 paid. Hanson afterwards, and a few days before the expiration of his contract, concluded he did not want the shares himself, but agreed with respondents that they might have the shares at \$100 per share. He thereupon paid to appellant the balance of the purchase price, \$5,150, and had the shares transferred to himself, and immediately transferred the same to respondents, who paid to Hanson the purchase price, \$5,200. Respondents were stockholders in the said company, Collins being president thereof. Appellant alleges in his complaint, substantially, that at the time he agreed to sell this stock to Hanson he was ignorant of the value of the stock, and that he relied upon certain representations of respondent Collins, a confidential friend, which representations were false and fraudulent, and made for the purpose of deceiving and inducing appellant to sell the said shares at the price of \$100 per share; that Hanson was a secret agent of respondents for the purpose of purchasing these shares, which fact was unknown to appellant, and that appellant, by fraud and deceit, was induced to sell his stock at much less than the real value; that the stock at the time of the sale was of the value of \$350 per share. Respondents denied these allegations

Nov. 1902.] Opinion of the Court.—MOUNT, J.

of the complaint, and upon the issues made the cause was tried before the court and a jury. A verdict was returned in favor of the defendants, and the plaintiff appeals.

Errors of the trial court are assigned upon the introduction of evidence, and upon the refusal to give requested instructions, and upon instructions given. Respondents were permitted to ask several of appellant's witnesses upon cross-examination with reference to the price which they had paid for and which they had sold stock for about two years prior to the time appellant sold the stock in question. The appellant had not gone into this question on direct examination. The general rule is that the inquiry should be as to the market value of the stock at or about or within a reasonable time of the particular sale in question. Abbott's Trial Evidence (2d ed.), p. 380; 2 Rice, Evidence, p. 1308. Especially is this true where the market is variable, and conditions of the property and its value have changed. Where market value is involved, and where witnesses have fixed the market value of a particular article, the court and jury ought to be put in possession of all the facts upon which the witnesses based their judgment. A wide discretion of the trial court should therefore be allowed upon cross-examination. But this discretion should not go to the extent of permitting irrelevant evidence to be introduced where the witness has not made it the basis of value testified to by him. The conditions which affect market value are so many and varied that it is often difficult to confine the inquiry to a particular time. When sales are far apart, and conditions have not changed, it would be reasonable to suppose that the market value had remained the same in the meantime. On the contrary, where sales are near together, and conditions are rapidly changing, and the market price is there-

by affected, a sale on one day may be little or no indication of the market value a few days distant. The mere lapse of time, therefore, is not the only criterion to guide the judgment in the determination of market value. The cost of an article like stocks is no indication of its value two years subsequent, where conditions and value have changed. The cost in such cases would often be misleading and prejudicial. In this case it is practically conceded that the stock at the time of its sale by appellant to Hanson on October 17, 1900, was of greater value than when the stock was purchased by the appellant, two years before; and the effect, therefore, of admitting this evidence, would be to permit the jury to take into consideration the cost of the stock, when the cost admittedly cast no light upon its value at the time of the sale. The only effect such testimony could have would be a prejudicial effect, because it would tend to discredit the actual market value of the stock at the time of the sale. This evidence was certainly erroneously admitted. *Dietrichs v. Lincoln & N. W. R. R. Co.*, 12 Neb. 225 (10 N. W. 718); *Denver & R. G. Ry. Co. v. Schmitt*, 11 Colo. 56 (16 Pac. 842); *Bowden v. Achor*, 95 Ga. 243, 259 (22 S. E. 254); *Omaha Southern Ry. Co. v. Todd*, 39 Neb. 818, 825 (58 N. W. 289).

It is claimed as error that the respondent Collins and a witness, Walter Holly, were permitted to state what wages they were paid while working for the Valley Mill Company, some months previous to the transaction in question. We cannot see just how this evidence was relevant or material. It certainly was not material to prove any of the issues and should have been excluded.

It is also claimed as error that the same respondent was permitted to testify concerning the ownership and cost of a building in the town of Buckley some time previous to

Nov. 1902.] Opinion of the Court.—MOUNT, J.

the sale in question. It is true, as appellant says, that the Valley Mill Company never had anything to do with this building. It was erected and owned jointly by appellant and respondent Collins. Appellant himself, on direct examination, went into this matter quite fully, in order to show the confidential relations existing between himself and Collins. It was therefore not error for the respondent to be permitted to testify upon the same subject. The trial court, we think, properly limited the examination in this respect.

It is also charged as error that the appellant, on cross-examination, was required to state what he had paid for this stock in 1898. It appears from the appellant's own evidence that the respondent Collins had purchased the 33 shares of stock in dispute for the appellant in the year 1898, with money furnished by the appellant, and that appellant had told Collins three or four times—the last time being in March, 1900—that he would divide this stock so that Collins and he would be even. But Collins had refused to take the stock because he did not have the money with which to pay for the same. Appellant also stated that he intended to let Collins have the stock at the price he had paid for it. After stating these facts, the appellant was then asked the question: "What was the price paid for that stock when Collins purchased it for you?" This question was objected to, the objection was overruled, and appellant answered: "I paid \$600 for 33 shares." Question: "That was \$18.18 a share, isn't it?" Answer: "Something like that." This evidence was clearly incompetent, as we have seen above, to fix the market value of the stock at the time appellant sold to Hanson. But upon the question of deceit we think it was admissible. If respondent was attempting to cheat and defraud the appellee,

lant, he certainly would not pay \$100 per share for stock through a secret agent, when he could purchase directly one-half of the same shares for \$18.18 per share. This was, it seems, some evidence against the accusation of fraud and deceit, and it was obtained from the appellant himself, and for the purpose stated we think was admissible.

The respondent Collins was permitted to testify to a conversation which he had with Mr. Hanson with reference to the option by which Hanson purchased the stock in question from appellant. Mr. Hanson, a witness for the respondents, was also permitted to testify what was said at the same conversation. Mr. Neely, also a witness for appellant, was permitted to testify to a conversation with respondents. These conversations occurred between the witnesses when appellant was not present, and were certainly not admissible, under elementary rules of evidence. The court should have sustained the objections of appellant thereto.

The other errors complained of have reference to instructions given and refused, which it is not necessary to discuss. It is sufficient to say that the instructions given by the trial court covered all the points necessary in the case, and were sufficient. We find no error in refusing the requested instructions.

It is insisted by respondents that there is no merit in appellant's case, and that upon an examination of the whole record this court will conclude that the verdict was in accord with the facts, notwithstanding technical errors may appear. Having examined the record, we agree that the weight of the evidence supports the verdict of the jury in this case, and, if we are to weigh the evidence and determine the case upon the facts, the cause should be affirmed. But it is not the province of this court to weigh

Nov. 1902.]Syllabus.

the evidence which has been passed upon by the jury. This is the function of the jury. The parties are entitled to a jury trial upon the facts unless a jury is waived (§ 21, art. 1, Constitution; § 4997, Bal. Code); and the jury, under proper instructions, must determine the facts. Where there is any substantial evidence to go to the jury, and this evidence is disputed, it is the duty of the jury, and not the court, to determine these disputed questions of fact, subject, however, to the right of the trial court to grant a new trial. *Hughes v. Dexter Horton & Co.*, 26 Wash. 110 (66 Pac. 109). Where prejudicial errors of law occur upon a jury trial, it is as much the duty of this court to reverse a case which we think is correctly decided upon the facts in evidence as it is to reverse one which we think is not correctly decided. In other words, it is not necessary for this court to determine the case upon the facts before deciding errors of law. For this reason, we cannot affirm the judgment below.

The cause will therefore be reversed for a new trial.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

DUNBAR, J., concurs in the result.

[No. 4870. Decided November 15, 1902.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK J. FENTON, *Appellant*.

30 326
32 146

HABEAS CORPUS — EFFECT OF APPEAL — STAY OF CRIMINAL PROSECUTION.

An appeal from an order denying the writ of habeas corpus to a prisoner charged with the commission of a crime will not operate as a stay of proceedings on the criminal charge pending the determination on appeal of the habeas corpus proceedings.

Syllabus.

[30 Wash.]

ASSAULT WITH INTENT TO ROB — INSTRUCTIONS — LESSER OFFENSE.

Where the defendant was upon trial on an information charging him with an assault with intent to steal the property of another, it was not error to refuse a requested instruction that the jury could bring in a verdict of attempt to commit robbery.

SAME — COMMENT ON FACTS.

The use by the court of the language "that in making the assault he intended to use whatever force might be necessary to overcome the prosecuting witness and accomplish his purpose—that of robbery," does not amount to a comment on the testimony, where it was immediately preceded in the same instruction by the charge, "if you believe from the evidence beyond a reasonable doubt that at the time in question he committed an assault upon the prosecuting witness for the purpose of robbery."

SAME — CREDIBILITY OF WITNESSES.

A charge to the jury that "you are judges of the credibility that ought to be given to the testimony of the different witnesses, and you are not bound to believe anything to be a fact because a witness has stated it to be so, provided you believe from all the evidence that such witness is mistaken, or has knowingly testified falsely," is a proper statement of the law, without the addition of the qualifying words, "unless corroborated by other competent evidence."

TRIAL — ARGUMENT OF PROSECUTING ATTORNEY — HARMLESS ERROR.

A case will not be reversed because of a misstatement of the law made by the prosecuting attorney in addressing the jury, when there was apparently no intent to misstate the law, and no instruction was asked by the defendant from the court for the purpose of correcting the misstatement.

EXCESSIVE PUNISHMENT.

A sentence of twelve years in the penitentiary upon a conviction for assault with intent to rob will not be disturbed on appeal as being excessive punishment, when it appears that the defendant was a dangerous man, of depraved mind, and that the instrument used was liable to cause loss of life.

Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Affirmed.

Frank B. Wiestling, for appellant.

H. D. Cooley, Prosecuting Attorney, for the State.

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

The opinion of the court was delivered by

DUNBAR, J.—The information upon which the appellant was convicted is as follows:

"Comes now H. D. Cooley, county and prosecuting attorney in and for Snohomish county, Washington, and by this his information accuses F. J. Fenton and Edward Costello of the crime of assault with intent to commit a felony, committed as follows, to-wit: That in the county of Snohomish and state of Washington, on the 19th day of October, 1901, said F. J. Fenton and Edward Costello, in and upon the person of one Oscar Combs unlawfully and feloniously did make an assault, with intent then and there unlawfully and feloniously by violence and putting in fear, from the person of him, the said Oscar Combs, the moneys, goods, and chattels of him, the said Oscar Combs, to take, steal, and carry away; contrary to the form of the statute," etc.

A separate trial was demanded. Costello was tried, and, before the trial of appellant was reached, he (appellant) made application for a writ of habeas corpus before the superior judge of Snohomish county, alleging that he was unlawfully restrained of his liberty, because he had had no trial under said information, and more than sixty days' time had passed since the same was filed. Issue of fact was joined on said application for discharge by habeas corpus, and the superior court, on March 11, 1902, dismissed the petition, and remanded the petitioner to the custody of the sheriff of Snohomish county, to which exception was then and there taken by petitioner, and he then and there immediately gave notice in open court that he appealed therefrom to the supreme court of this state. This appeal is now pending. No supersedeas was requested, and none was granted. Upon giving the above notice of appeal, appellant moved the court for an order dropping this cause from the trial calendar, which was denied. The

trial proceeded, and resulted in the conviction of the appellant. Judgment was pronounced, sentencing the defendant to imprisonment in the penitentiary for twelve years. From such judgment this appeal is taken.

The first error alleged is that the court erred in refusing to strike this case from the trial calendar, in overruling appellant's objection to proceed with the trial, and in going on with the trial and proceeding to judgment and sentence after notice of appeal to the supreme court had been given in the habeas corpus case. It is the contention of the appellant that, after the notice of appeal was given, the appellant was under the sole and exclusive jurisdiction of the supreme court; that the questions as to the validity of the information and the legality of his restraint are transferred to this court for determination, and the superior court ceases to have any jurisdiction over his person or over the subject matter of the action; that, under such circumstances, the judgment and sentence of the lower court were *coram non judice*, and null and void; that the appeal from a judgment of remand in a habeas corpus case by the petitioner operates as a stay of all other proceedings, and all other processes, including the warrant under the information by which the appellant was being held, and that this court became at once the legal custodian of the appellant; and that the effect of the appeal was to place the case in the same position as if it was an original application to this court for habeas corpus. Appellant cites 9 Enc. Pl. & Pr., p. 1029, to the effect that a writ of habeas corpus issued by an appellate court acts as a supersedeas suspending the powers of the court below, and all proceedings had by an inferior court after the issuance of the writ are erroneous, and *coram non judice*; and 15 Am. & Eng. Enc. Law (2d ed.), p. 213, to the effect that the writ of habeas corpus is paramount to and supersedes all other writs and

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

processes under which the party may be detained. Of course, the first citation is literally true, for the object of a writ of habeas corpus is to suspend the operation of the lower court until the rights of the petitioner are determined thereunder. But that is where the writ issues out of the appellate court, and it is the common language of courts, as expressed in the second citation, that the writ of habeas corpus is paramount to and supersedes all other writs and processes under which the party may be detained. While this language is sweeping, however, an examination of the cases cited by the authors referred to, upon which the texts were founded, shows that the expressions quoted were not used in cases involving the principles involved in this contest. So with the cases from this court cited by appellant. These are cases where the appeal was taken in the habeas corpus case, and the principles discussed were in relation to errors committed in the trial of the habeas corpus case in the lower court. The one exception is the case of *State v. Humason*, 4 Wash. 413 (30 Pac. 718), but the decision in that case was based upon a section of the Revised Statutes of the United States which covered the case in point. This, unlike any other case, is the attempted injection of the habeas corpus proceedings into the trial of another case which is on appeal to this court. When the writ was denied by the lower court, and the applicant remanded, that was the end of the case, so far as the stay of the case then pending was concerned, and must necessarily be so to insure the orderly and effective administration of justice. This court placed a very liberal construction upon the statute when it sustained the right of appeal in habeas corpus cases, and it is not inclined, nor do we think the law compels us, to go to the extent of aiding defendants in criminal actions to prevent indefinitely a trial of causes on the merits by repeated applications for writs of habeas corpus

and appeals from the decisions in such cases if the applications are unsuccessful, which would be the result of sustaining appellant's contention. If this contention can be sustained at all, it can be so only on the theory that the appeal by virtue of itself worked a stay of proceedings. If there is a stay, it is by force of the statute, and we are not cited to any statutory provision in that regard. The statutory provisions for a stay in either a civil or criminal action are found in §§ 6506 and 6529, Bal. Code, and neither contemplates a stay in a case of this kind. A habeas corpus proceeding cannot be said to be a criminal action, for, while it is frequently invoked by criminals or persons charged with crime, it is not a criminal action, so far as the parties to the cause are concerned. Its office is to inquire into the legality of the custody of the applicant, and sometimes the applicant is charged with crime; but it is frequently sued out for the purpose of determining the proper care and legal custody of children, and is in no sense criminal in its application. In this case we think the appeal from the habeas corpus proceedings did not stay the proceedings in the criminal cause, and that the court did not err in refusing to strike the cause from the docket.

Appellant requested the court to instruct the jury that they could bring in a verdict of attempt to commit robbery, and the refusal of the court to so instruct is the second assignment of error. The court did instruct the jury that they could bring in a verdict of simple assault, or an assault and battery, and we think this is as far as it should have gone. The information, under the provisions of the statute, charged the defendant with an assault with intent to steal the property of another, and we hardly see how the question of assault can be eliminated from the attempt under this statute. It will be noted that the information did not charge the substantive crime, but an as-

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

sault with intent to commit the crime. We think the instruction was properly refused.

The following instruction of the court is alleged as error on the ground that it was a comment upon the testimony:

“You are further instructed that you should convict the defendant of assault, with an intent to commit robbery, if you believe from the evidence beyond a reasonable doubt that at the time in question he committed an assault, or aided or advised the assault, upon the prosecuting witness for the purpose of robbery, and that in making the assault he intended to use whatever force might be necessary to overcome the prosecuting witness and accomplish his purpose,—that of robbery.”

We are unable to see that there is any element of comment on the testimony in this instruction. The jury certainly understood, when the court said “that in making the assault” and words following it was connecting those words with the preceding portion of the instruction, “if you believe from the evidence beyond a reasonable doubt” that he did, etc.

The fourth assignment is that the court erred in charging the jury to disbelieve a witness who was mistaken, or had knowingly testified falsely, without the qualification “unless corroborated by other competent evidence.” It is a sufficient answer to this to say that no such charge was given by the court. The instruction was as follows:

“You are further instructed that you are judges of the credibility that ought to be given to the testimony of the different witnesses, and you are not bound to believe anything to be a fact because a witness has stated it to be so, provided you believe from all the evidence that such witness is mistaken, or has knowingly testified falsely.”

This was a proper statement of the law. The jury were not told in said instruction that they must disbelieve the witness, and the last proviso, “provided you believe from

all the evidence that such witness is mistaken, or has knowingly testified falsely," covers in effect the ordinary statement which the appellant insists upon having interjected, namely, "unless corroborated by other competent evidence."

The fifth assignment is that the court erred in overruling the demurrer to the information. The information in this case was sustained by this court in the case of *State v. Costello*, 29 Wash. 366 (69 Pac. 1099); but, as an independent proposition, we think the information was sufficient.

In regard to the next assignment,—that the court erred in denying appellant's motion for a new trial, for the reason that the verdict was contrary to law and the evidence, and the evidence was insufficient to justify the verdict,—an examination of the record convinces us that there was ample testimony to warrant the verdict.

The seventh assignment relates to the objections made to forms of questions and colloquies between the prosecuting attorney and a witness, William Spurrell. While these questions seem to be somewhat leading, the circumstances under which the testimony was produced in court, as shown by the record, justified, we think, the questions asked.

The eighth assignment is in regard to objections to a statement made to the jury by the prosecuting attorney in reference to the law. It is frankly admitted by the prosecuting attorney that the statement made was a misstatement of the law in reference to the use of depositions, but he asserts that he thought at the time he was stating the law correctly, and, as there seemed to be no intent to misstate the law, and as the appellant did not ask the court for any instruction on the law in that regard, we do not think that he can urge the objection here. In any event, we do not think that the statement was of sufficient importance to warrant a reversal of the case.

Nov. 1902.]

Syllabus.

The ninth assignment—in regard to the introduction of pieces of hose offered in evidence—was passed upon by this court in opposition to appellant's contention in *State v. Costello, supra*.

The last assignment is that the court erred in abusing its discretion in the severity of the sentence imposed, namely, twelve years in the penitentiary; and a very earnest plea is made by counsel for appellant for the modification of the sentence by this court. But, while twelve years seems to be somewhat severe, an examination of the record in this cause convinces us that the appellant was of a very depraved mind, and a dangerous man in a community; and that when this assault was made it was made with the knowledge that it was liable to result in loss of life. Under all the circumstances as shown by the record, we feel unwilling to disturb the judgment of the trial court in that respect.

The judgment in all things will be affirmed.

REAVIS, C. J., and FULLETON, ANDERS and MOUNT, JJ., concur,

[No. 4809. Decided November 18, 1902.]

DAVID SUTTER, *Respondent*, v. MOORE INVESTMENT COMPANY, *Appellant*.

**NOVATION — SUBSTITUTION OF DEBTORS — EVIDENCE — CONVERSATIONS
BETWEEN ORIGINAL AND SUBSTITUTED DEBTOR.**

Conversations between a debtor and one who assumed his obligation under a new contract are admissible, in an action by the creditor against the substituted debtor, for the purpose of showing the understanding arrived at by the parties to the novation.

Opinion of the Court.—DUNBAR, J. [30 Wash.**SAME — SUFFICIENCY OF EVIDENCE.**

In an action upon a contract by novation wherein a new debtor was substituted for the old, a nonsuit was properly refused where it appeared that plaintiff refused to supply a restaurant keeper with meats for his business owing to non-payment of bills due; that defendant agreed to pay the debtor's obligation to plaintiff and the latter agreed to accept the defendant instead of the original debtor; that as part of the agreement the receipts of the restaurant business were turned over to defendant; and that further goods were furnished on the credit of defendant under the new agreement and bills rendered to defendant, who made part payment on both the old and the new accounts.

SAME — CONTRACT MADE BY CORPORATE EMPLOYEE — LIABILITY OF CORPORATION.

Evidence that the manager of the defendant company, at the time the alleged novation was entered into, called plaintiff up by telephone and said: "This is the Moore Investment Company, Mr. Moore talking," was sufficient to establish that the contract was entered into by the manager in his representative capacity rather than as an individual.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Affirmed.

Smith & Cole, for appellant.

Richard Osborn, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The respondent sued appellant on two causes of action, alleging in both that appellant owned, controlled, and managed the Lincoln building in Seattle, and operated and conducted the same as an apartment house; that for the accommodation of the tenants of the Lincoln, a restaurant, known as the "Lincoln Cafe," was conducted by one Tremaine; that on March 4, 1901, Tremaine owed the respondent for meats \$411.28, and was refused further credit unless such indebtedness was paid; that thereupon appellant, respondent, and Tremaine entered into a novation.

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

tion, whereby appellant, for the purpose of keeping the said restaurant running, and in consideration of the arrangement made between it and Tremaine for the payment to it of the receipts of the restaurant, agreed to pay said bill, and respondent accepted appellant and discharged said Tremaine, and that thereafter, on March 8, 1901, appellant paid respondent \$211.23 of said bill, agreeing to pay the balance of \$200 within one week; and that the same was never paid. For a second cause of action it is alleged that appellant directed respondent to furnish whatever meat should be required to supply said restaurant, and agreed that upon presentation of weekly statements of the amount so furnished it would pay the same; that, relying upon such agreement, the respondent furnished the restaurant with meats to the value of \$562.54, and rendered weekly statements, which appellant promised to pay, but it paid no part thereof except \$50, leaving a balance due of \$512.54. The total amount sued for is \$712.54. The appellant interposed a general denial to the first and second causes of action, excepting it admitted that the Lincoln was an apartment house, and that it paid the respondent \$211.23 on March 8, 1901, and also the sum of \$50, and denied that any sum was owing from it to the respondent. After respondent's case was presented, appellant made a motion for a nonsuit, which was denied. A verdict was rendered by the jury for the amount prayed for by the respondent, and a new trial on the ground of insufficiency of the evidence to justify the verdict and for errors of law occurring at the trial was denied.

The contention that the court erred in overruling the objections to the testimony of Tremaine relative to a conversation between himself and Moore is untenable. Tremaine was one of the parties to the novation and the

testimony was simply a link in showing the understanding arrived at.

It is claimed by the appellant that a novation was not established by the testimony. The doctrine of novation is so well understood that it hardly seems necessary to cite authorities to define it. Novation means substitution. It may be either the substitution of a new obligation for an old one between the same parties with intent to displace the old obligation with the new, or the substitution of a new debtor for the old one with intent to discharge the old debtor, or the substitution of a new creditor with intent to transfer the rights of the old creditor to the new. The second class is the ordinary case of novation, and is the case involved in the cause on trial. A novation is a new contractual relation. It is based upon a new contract by all the parties interested. It must have the necessary parties to the contract, a valid prior obligation to be displaced, a proper consideration, and a mutual agreement. If A. owes B. a sum of money, and C. agrees to pay the debt of A. to B., and B. agrees to accept C. instead of A. as payor of the debt, and to discharge A. from his original obligation, that is a novation. There was sufficient stated in the complaint to create a novation, and we think the testimony was sufficient to be submitted to the discretion of the jury. It appears that Tremaine turned over the receipts of the business to the appellant, that the appellant agreed to pay Tremaine's obligation to the respondent, and that the respondent agreed to accept the appellant instead of Tremaine. As to the goods subsequently furnished to Tremaine, the respondent testifies positively that he would not have furnished them except for the agreement, and that he rendered his bills to appellant company.

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

The appellant contends and testifies through its manager that the secretary of the appellant company became simply the cashier of the appellant, and was in no way responsible for any particular debt. But there was a plain conflict of testimony on that subject, which the jury determined in favor of respondent's contention. It is again contended by the appellant that, if there was any promise to pay or substitute, it was Moore individually, who was the manager of the company, that entered into the contract, and not the appellant company. But upon this there is also a conflict of testimony. A part of this contract was made through the medium of the telephone, and Tremaine and respondent testified that when Tremaine and the appellant had come to an understanding that the appellant was to be substituted for Tremaine, Moore, the manager of the appellant company, called up the respondent by telephone, and commenced the conversation in this wise: "This is the Moore Investment Company, Mr. Moore talking." We think this was sufficient to convey the idea to the respondent that he was dealing with the Moore Investment Company, and not with the particular individual who was at the telephone.

No error of law having been committed by the court, and the case having been submitted to the jury under proper instructions, the judgment will be affirmed.

REAVIS, C. J., and FULLERTON, ANDERS and MOUNT, JJ., concur.

[No. 4410. Decided November 28, 1902.]

THE STATE OF WASHINGTON, *Respondent*, v. L. F. BOYSEN, *Appellant*.

BURGLARY — ENTRY.

In a prosecution for burglary, a sufficient entry to sustain a conviction is shown, where it appears that a window was broken by one person, who reached in and removed stores from the building and handed them to another.

SAME — ACCOMPLICES.

An accomplice who takes goods handed him from a building by another who has effected a burglarious entry is liable as a principal.

Appeal from Superior Court, King County.—Hon. ARTHUR E. GRIFFIN, Judge. Affirmed.

Benson & Aust, for appellant.

Walter S. Fulton, Prosecuting Attorney, and *Vince H. Faben*, for the State.

The opinion of the court was delivered by

DUNBAR, J.—The appellant, together with one James Murphy, was accused by information of the crime of burglary. Murphy pleaded guilty, and was sentenced to one year in the penitentiary. The appellant entered a plea of not guilty, and upon the trial, after the close of the state's testimony, his attorney moved the court for an order discharging the defendant and dismissing the jury. The motion was denied, and exception allowed. The defendant then testified on his own behalf, after which the state introduced testimony in rebuttal, and the case went to the jury, which returned a verdict of guilty as charged. A new trial was moved and denied, and a judgment of sentence of eighteen months in the peni-

Nov. 1902.] Opinion of the Court.—DUNBAR, J.

tentiary was pronounced. From that judgment this appeal is taken.

The assignment is that the court erred in not sustaining the motion of defendant for a discharge, and that the verdict is not supported by law nor the evidence in the case. We think neither contention is sustained by the record. It is contended by the appellant that there was no entry, and that the building alleged to have been burglarized was a small addition to a hotel and saloon, in which was stored provisions for the hotel. The cook testified that, upon hearing a crash which sounded like breaking glass, he got up, and looked, and saw a man reach in through the window, and take out hams, fresh meat, and bacon. His wife, who saw the performance, and who waked her husband when she heard the noise, testified that one man was reaching into the window, taking out the stores, and handing them to the other. The wife watched while the husband went around into the saloon and obtained assistance. As, with the assistance obtained, he came upon the scene, one of the men, who afterwards proved to be Murphy, attempted to jump over the wall, and was captured. The appellant ran up the stairway, refusing to obey the injunction to halt until he was shot in the leg by one of the posse. There was testimony that these men had been drinking together in the saloon during the evening, though the appellant testified that he did not know Murphy, and had never seen him. The contention of the appellant that no entry was shown to have been made by him is refuted by the testimony that the window was broken, and that one of them reached in, and removed the stores, and handed them to the other. It makes no difference whether the one who was removing the stores, and had actually entered the premises for that purpose, was the appellant or his

accomplice. Each was a principal in the act, and each was acting for and with the other. The testimony, it is true, is not extensive, but it was very pertinent, and surely sufficient to sustain the verdict of the jury.

The judgment is affirmed.

REAVIS, C. J., and ANDERS, FULLERTON and MOUNT, JJ., concur.

[No. 4297. Decided December 2, 1902.]

FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, *Respondent*, v. OLE B. NELSON *et ux.*, *Appellants*.

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38 382

CORPORATIONS — CREATION BY SPECIAL ACT — LAWS OF SISTER STATE — PRESUMPTION AS TO VALIDITY.

Where the laws of a sister state duly authenticated are placed in evidence showing an act specially incorporating plaintiff as a corporation, no presumption can be indulged that the law is invalid because such an act would be unconstitutional in this state (*Gunderson v. Gunderson*, 25 Wash. 459, distinguished).

TRUSTEES — DISCHARGE — APPOINTMENT OF SUCCESSOR.

Where a trustee was appointed in the place and stead of other trustees of an estate, upon the petition of the latter to be discharged, and such substituted trustee accepted the trust and entered upon its active management as sole trustee and continued to so act for more than twenty years, a debtor to the trust estate cannot urge, in an action by such trustee to enforce collection of a debt, that it was merely a co-trustee because of failure of the court appointing it to enter an order discharging the old trustees.

FOREIGN TRUSTEES — RIGHT TO SUE IN THIS STATE.

A trustee charged with the administration of an estate, though appointed by the court of a sister state, may maintain an action in the courts of this state respecting the trust property, when no local creditor is affected.

Dec. 1902.] Opinion of the Court.—FULLERTON, J.

ASSIGNMENT IN BLANK — AUTHORIZED COMPLETION — EFFECT.

The fact that an assignment of a mortgage was made in blank to an unnamed assignee would not affect the right of such assignee to maintain action thereon, where the assignee's name was afterwards inserted in the blank with the express assent of the assignor.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Affirmed.

Adolph Munter, for appellants.

Fitch & Harris and *A. G. Avery*, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—This is an action brought to recover upon a promissory note, and to foreclose a mortgage given to secure the same. The note and mortgage in suit were executed and delivered by the appellants to the Solicitor's Loan & Trust Company, a corporation, which, in turn, for a valuable consideration, assigned the same to the respondent. The defenses set up are almost wholly technical. It is not disputed that a large sum (all that the respondent claims, in fact) is justly due and owing upon the note and mortgage, but it is claimed that the respondent did not sufficiently prove its legal capacity to maintain the action. While some thirty-one assignments of error have been made, they can all be grouped under a few general heads; and it is in this manner we shall proceed to consider them, without making reference to the specific assignments.

1. The respondent was incorporated by a special act, and certain acts supplemental thereto, of the legislature of the state of Pennsylvania. It sought to prove its due incorporation by producing a copy of these acts, duly authenticated under the great seal of that state. It is contended that this was insufficient, because it was not

Opinion of the Court.—FULLERTON, J. [30 Wash.

shown that the legislature of that state had constitutional power to pass a special act of incorporation. The argument is that, because our own constitution prohibits our legislature from creating corporations by special acts, we must presume, in the absence of a showing to the contrary, that the constitution of Pennsylvania is the same, and hence the act relied upon is unconstitutional. *Gunderson v. Gunderson*, 25 Wash. 459 (65 Pac. 791), is cited as maintaining this principle. We did say in that case that, in the absence of a showing to the contrary, we would presume that the laws of a sister state were the same as our own, but that is not the present case. Here there is proof of a law of the sister state, and, if we were to indulge in presumptions at all, we would presume that it was passed with all due formalities, is within the constitutional powers of the legislative body which passed it, and is a valid and existing law, rather than presume that, because our constitution prohibits such law, the Pennsylvania constitution must likewise do so. By the constitution of the United States each state must give full faith and credit to the public acts, records, and judicial proceedings of every other state; and it would not be doing so to ignore a statute of a sister state, proven with the due formalities required by our own laws, merely because such an act could not be passed under our own constitution.

2. Among the powers conferred upon the respondent by the act incorporating it is the power to receive, hold, and manage trust estates. From the evidence it appears that one John Gibson died testate in Pennsylvania, leaving a large amount of property, which he devised to three trustees by name, "and their successors," to manage and dispose of according to certain directions contained in his will. One of the trustees named refused to qualify as

Dec. 1902.] Opinion of the Court.—FULLERTON, J.

such, and the trust was assumed by the remaining two. Of these, one never took any active part in the management of the trust estate, and the burden thereof was actually carried by one. After several years the trustees qualifying petitioned the orphan's court of Pennsylvania county to be relieved of their duties under the trust, reciting in their petition the foregoing facts, and the further facts that the trustee having the estate actively in charge was, owing to ill health, no longer able to perform the duties required of him in the management of the estate, and that the other did not desire to take upon himself the active management. They prayed that they be discharged of the trust, and that the respondent be appointed in their place and stead. All parties in interest appeared in the orphan's court and consented in writing that the petition be granted, whereupon the court ordered and decreed that the respondent "be appointed trustee under the trusts of said will, in the place and stead of the said" petitioners, and further ordered that the petitioners be discharged as such trustees on paying over, transferring, and assigning to the respondent all the property in their hands belonging to the estate. While it appears that the respondent accepted the trust, and entered upon its active management as sole trustee, it does not appear that any subsequent order was entered discharging the old trustees, and from this it is argued that the respondent is not shown to be the sole trustee, and cannot maintain this action without joining its co-trustees. It is evident, however, that the respondent and the persons originally named as trustees did not become co-trustees under the order of the court. The respondent was appointed in the "place and stead" of the original trustees, not to act jointly with them; and, if

it is not the sole trustee, it is not a trustee at all. Nor do we think the order can be construed not to be immediately operative. The phrase "discharged as trustees", in the concluding part of the order, evidently means discharged from liability under the trust, rather than from the active performance of it. But more than this, it appears that the respondent entered upon the performance of the duties of the trust immediately after this appointment, and has continued in the performance of those duties, acting at all times as sole trustee, for more than twenty years, without question as to its right by any of the parties interested in the trust estate. This alone is sufficient evidence of right. Certainly no one interested in the trust estate could raise this question at this late day, and a stranger thereto ought not to be permitted to do so in order that he may defeat the collection of a just debt owing by him to the trust estate.

3. Another reason urged for reversal is that the respondent cannot maintain an action as trustee within this state. Strictly speaking, perhaps, a trustee deriving his powers from statute or judicial appointment cannot, as of right, maintain an action in courts outside of the jurisdiction of his appointment, and the tendency of the courts in earlier times was to refuse to entertain such actions. It may be true, also, that this privilege is even now generally denied to executors and administrators. But this court has, in common with many other courts, adopted a different rule with reference to certain classes of trustees, such as receivers, assignees, and like officers, and permit these to maintain actions when to do so does not interfere with the rights of local creditors pursuing their remedies in the local courts. *Whitman v. Mast*, 11 Wash. 318 (39 Pac. 649, 48 Am. St. Rep. 874); *Happy*

Dec. 1902.] Opinion of the Court.—FULLERTON, J.

v. Prickett, 24 Wash. 290 (64 Pac. 528). See, also, for the general rule, *Iowa & California Land Co. v. Hoag*, 132 Cal. 627 (64 Pac. 1073), and cases there collected. The privilege is extended to these officers on the principle of comity and there would seem to be no just reason for making a distinction between them and a trustee having the powers possessed by the one before us. As no local creditor is affected, we think the right of action should not be refused.

4. Some question is made as to the validity of the assignment from the original mortgagee to the respondent, it appearing that the name of the respondent was not inserted in the blank form of assignment used until sometime after the transfer was actually made. As the note and mortgage were actually paid for and delivered, it would seem that in a court of equity a showing of a failure to make a formal indorsement of the papers ought not to be fatal to the right of the purchaser to recover thereon; but, be this as it may, it was shown by the uncontradicted testimony, that the respondent's name was afterwards inserted in the blanks with the express consent of the assignor. If title did not fully pass by the sale and delivery, it did do so by the latter transaction.

The judgment is affirmed.

REAVIS, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

30	346
696	39
30	346
637	115
337	322

[No. 4489. Decided December 2, 1902.]

JOSEPH P. LAMBERT, *Appellant*, v. LA CONNER TRADING
and TRANSPORTATION COMPANY, *Respondent*.

NEGLIGENCE — EVIDENCE — DECLARATIONS OF VICE PRINCIPAL — *RES GESTAE*.

Declarations made regarding an accident, made immediately after its occurrence by a vice principal, who was the person through whose negligence it is charged as having occurred, are admissible in evidence as part of the *res gestae* (*Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, followed).

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

A. W. Buddress, for appellant.

Ira Bronson, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The appellant (plaintiff) brought this action against the respondent to recover damages for personal injuries received by him while in the employ of the company, caused by the alleged negligence of the company in running its steamer into a drawbridge. The case was tried by a jury, and, upon the conclusion of plaintiff's testimony, the court, on motion of the defendant, granted a nonsuit on the ground that the testimony introduced by the plaintiff did not show negligence on the part of the defendant. The cause was dismissed, and from said judgment of dismissal this appeal is taken.

This cause will have to be reversed in any event for the following error, which is assigned by the appellant: The appellant sought to prove by a witness that the master of the boat had made certain statements immediately after the accident occurred. Objection was made to this testi-

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

mony, which objection was sustained by the court. It is urged by the respondent that the question was not sufficiently limited as to time, and that it did not appear that it was at or immediately after the accident that the conversation sought to be elicited was indulged in. But we think the respondent is mistaken in this regard. On page 15 of the record appears the following question asked by appellant's counsel of the witness Lambert: "Did you ever have any conversation with the master of this vessel, after the injury, in regard to this injury?" This question was probably objectionable, and was objected to by Mr. Bronson, counsel for respondent, in the following manner: "If the court please, he has absolutely condemned his question now by placing a time limit. This master could not say anything after this injury took place which would in any way affect the defendant in this case. The master of a vessel, of course, is a man of very large powers, and can bind the owners to a very large extent, in given lines, under certain fixed rules. But he hasn't any authority to make statements and admissions after the transaction has occurred." The court: "I sustain the objection." Counsel for the appellant then sought to make the question more definite by asking the following: "I want to ask you whether or not, immediately after the injury, the master saw you in regard to the injury." Answer: "Why, he saw me." Question: "Did he talk to you in regard to this injury?" This question also was objected to, on the ground that it was leading, and for the further reason that what the master might have talked with the witness about the injury—what he might have said about it—would not have any effect upon the trial of the cause. The court: "I think not. I don't think he could make any statement at all that would be binding upon his employers. I do

not think that that was within the scope of a master's duties, to make a statement after an accident." The appellant then took exceptions to the ruling of the court, and the cause proceeded. So that it plainly appears that the appellant was precluded by the court from asking any questions in regard to statements made by the master immediately after the accident, or at all. It is contended by the appellant that a statement made at the time or immediately after is a part of the *res gestae*, and admissible as such. Such statements made at the time have, under all authority, been held admissible as a part of the *res gestae*. The authorities are somewhat divided as to admissions made after, but the great weight of authority, and the authority which this court has followed, is to the effect that statements made immediately after the transaction are admissible as a part of the transaction. It is unnecessary to cite outside authority, for this court has passed directly upon this proposition in *Roberts v. Port Blakely Mill Co.*, ante, p. 25 (70 Pac. 111). That was an action brought against a mill company for damages caused by the negligent operation of a railroad, and it was held that declarations of a general superintendent, who had direction and management of the railroad, made while examining the wreck, soon after his arrival at the scene thereof, three hours after it occurred, were admissible as being part of the *res gestae*; that the declarations were not the narrative of a past event, but were the natural declarations growing out of the event, and were so nearly contemporaneous with the accident as to be held to be in the presence of it. The authorities relied upon are collated and cited in that case, and the question asked by the appellant in this case falls squarely within the rule announced. Without specially reviewing the testimony,

Dec. 1902.]

Syllabus.

we think sufficient was introduced to warrant the court in submitting the question of negligence to the discretion of the jury. The question has been so often discussed by this court that it would be of no benefit to discuss the proposition again. We think the cause falls within the rule announced in *McQuillan v. Seattle*, 10 Wash. 464 (38 Pac. 1119, 45 Am. St. Rep. 799); *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287 (57 Pac. 820); *Traver v. Spokane Street Ry. Co.*, 25 Wash. 225 (65 Pac. 284); *Jordan v. Seattle*, 26 Wash. 61 (66 Pac. 114); *Burian v. Seattle Electric Co.*, 26 Wash. 606 (67 Pac. 214); and *Clukey v. Seattle Electric Co.*, 27 Wash. 70 (67 Pac. 379).

The other errors complained of will probably not occur again on a retrial, but for the errors discussed the judgment is reversed.

REAVIS, C. J., and FULLERTON, ANDERS and MOUNT, JJ., concur.

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41	696

[No. 4095. Decided December 6, 1902.]

FRED SAWDEY, Appellant, v. SPOKANE FALLS and NORTHERN RAILWAY COMPANY, Respondent.

RAILROADS — COLLECTION OF HOSPITAL DUES — TREATMENT OF EMPLOYEE — MALPRACTICE — GRATUITOUS TREATMENT — QUESTION FOR JURY.

Where a railroad company made a practice of deducting a certain portion of the monthly wages of its employees for hospital dues and of taking care of sick or injured employees, irrespective of whether the illness was incurred in the regular course of employment, a question for the jury was presented as to whether treatment was gratuitous or by reason of contract relations, in the case of an employee who had been injured off the premises of the company after his day's work was done, and had been treated by the company surgeon at its hospital.

SAME — ESTOPPEL.

A railroad company sued for malpractice of its surgeon in treating one of its employees is estopped to say that the service was gratuitous, because he was not injured during work hours, when it had taken plaintiff to its hospital and entered upon his treatment without informing him that it was extending a charity, instead of making a return for the hospital dues it had collected from him during the course of his past employment.

INTERROGATORIES — INTRODUCTION IN EVIDENCE — CONCLUSIVENESS OF ANSWERS.

A party who has propounded interrogatories to his adversary may put the answers in evidence without being bound by their statements against his interest, but, under Bal. Code, § 6012, he is entitled to contradict such answers by other evidence.

MASTER AND SERVANT — INJURY OF EMPLOYEE — MALPRACTICE OF SURGEON — LIABILITY OF MASTER.

If a railroad company contracts for a consideration to treat its employees for any injury they may receive while in its employ, it is liable for the malpractice of the surgeon employed therefor, notwithstanding it exercised due care in the selection of such surgeon (*Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, distinguished).

SAME — SUFFICIENCY OF EVIDENCE — NONSUIT.

In an action to recover damages for malpractice, the granting of a nonsuit was erroneous, although a physician called by plaintiff had testified that his condition after treatment might have been the natural result from the character of his injury, when it appears that a second operation had been necessary, that the surgeon employed to assist therein pursued different treatment from that adopted by the surgeon in charge, and that another surgeon had testified that the treatment employed in the first instance was not the usual method in such cases. The necessity for a second operation of itself afforded some evidence that plaintiff had been subjected to unnecessary danger, delay in recovery, pain and suffering, and thus afforded a question for the jury to pass upon.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

Barnes & Latimer, for appellant.

Will H. Thompson and M. J. Gordon, for respondent.

Dec. 1902.] Opinion of the Court.—FULLETON, J.

The opinion of the court was delivered by

FULLETON, J.—The appellant brought this action against the respondent to recover damages alleged to have been suffered by him because of the unskillful and negligent manner in which he was treated for a fracture in the lower third of the femur of his left leg by the respondent's surgeon. On the trial, at the close of the appellant's case, the respondent interposed a challenge to the legal sufficiency of the evidence, which challenge the trial court sustained; taking the case from the jury and directing a judgment for the respondent. The challenge was based upon two grounds: (1) That the respondent undertook to treat the appellant gratuitously, and is liable only for the failure to use ordinary care in selecting the surgeon, and that there was no evidence tending to show that it had been negligent in selecting the surgeon; and (2) that there was no evidence that the surgeon selected treated the appellant in a negligent or unskillful manner.

The facts bearing upon the first ground of challenge are substantially these: The respondent is a railway company, and the appellant was one of its employees. The appellant was injured by falling over a low switch stand in the yard of another railway company while on his way from his place of employment to his home after quitting his work for the day. He was immediately taken to the hospital with which the respondent had arranged for the care of its injured employees, and there placed under the treatment of the respondent's surgeon. The appellant had been in the employ of the respondent for some two and one-half years. During that time the respondent had deducted monthly from his wages certain fixed sums, based on the amount paid him, which it had retained and credited on its books to its hospital fund.

There was no special contract entered into between the appellant and the respondent defining the respondent's undertaking in consideration of these deductions, nor was it shown whether or not the appellant had rules applicable thereto. The appellant testified that he made no objection to the company's making such deductions, and that nothing was ever said to him concerning its purpose in so doing, but that it was the custom of all railroad companies of which he had knowledge to make such deductions, and that he understood that he was entitled, in consideration thereof, to hospital accommodations and medical and surgical treatment at the respondent's expense for any sickness he should have or injury he should receive while in the company's employ. It was shown that the company made like deductions from the wages of all its employees, that these deductions exceeded by a considerable sum the amount expended in the care of its sick and injured employees; that, while a separate account of the fund was kept on the books of the company, the fund itself was not kept separate from the company's general fund, but was commingled therewith, and used in the transaction of the general business of the company; and that the amount of the account, as shown on its books, was, to use the language of one of its officers, "voluntarily reduced at one time." It was shown, also, that the respondent had treated others of its employees who had become sick and injured while in its employ, without question as to the cause or source of the sickness or injury; and certain of these testified that their understanding of the respondent's undertaking was as the appellant had testified. The respondent, however, in answer to certain interrogatories propounded to it by the appellant at the commencement of his action, stated that it undertook to treat only such of its employees as should be injured in the

Dec. 1902.] Opinion of the Court.—FULLETON, J.

course of their employment, and that, while it had treated certain of them for injuries not so received, it had done so voluntarily,—not because it was obligated to do so.

The respondent's contention that it undertook gratuitously to treat the appellant is rested first upon the fact that the appellant was injured after he had ceased work for the day, and the claim that there was no evidence that it contracted, for a consideration, to treat him for an injury so received. But it seems to us that unless its answer, to the effect that it undertook to treat only such of its employees as should be injured in the course of their employment, is to be taken as conclusive, there was here some evidence from which the jury might have found that its liability was not thus limited. The respondent may, it is true, fix the terms upon which it will receive any one into its service. This it may do by special contract, or by general rules called to the attention of those seeking employment in its service; but, in the absence of such special contract or general rules, the contract is such as the law implies from the acts of the parties and the surrounding circumstances, and cannot be governed by any secret or undisclosed limitations either of the parties may have in mind. Here the acts of the parties, the surrounding circumstances, and the conduct of the appellant with relation to the fund collected, are as much consistent with the idea of contract to treat the employees for injuries received in whatsoever manner, as it is of one to treat only for injuries received in a particular way; and the question was therefore one for the jury, and not the court. But there is another ground for requiring the question to be submitted to the jury. There was evidence tending to show that the respondent had never made it known that it claimed that its contract was only to treat its employees for injuries received by them in the course

of their employment. It had always, so far as shown, acted to the contrary. It took the appellant to its hospital and entered upon his treatment, without informing him that its contract was limited, or that it claimed to be treating him gratuitously. Clearly, on the principle of estoppel, it ought not to be heard now to say, in order to escape liability for malpractice, that it was only extending to him a charity.

Nor was the answer to the interrogatory conclusive of the question of the respondent's liability, although introduced in evidence by the appellant. Answers to interrogatories are in the nature of admissions. While the party calling for them may put them in evidence for the admissions they contain, he is no more bound by their statements against his interest than he is bound by the statements of a witness he may call, and who may testify in part against his interest. He can still introduce evidence contradictory of such statements, and leave it to the jury to determine wherein the truth lies. Moreover, the right to contradict answers to interrogatories, though introduced by the party calling for them, is expressly granted by statute. Ballinger's Code, § 6012; *Denny v. Sayward*, 10 Wash. 422 (39 Pac. 119).

The second ground is that the evidence is insufficient to make a case for the jury, under the rule of *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648 (39 Pac. 95). This claim is founded upon the concluding part of the opinion in that case, where this language is used:

"But, suppose the contention of the respondent to be true that the appellant so conducted itself that it caused the respondent to believe that it was furnishing to him surgical treatment, and that it is estopped from denying that such was the fact, does it follow under the facts of this case that it is liable for the malpractice of the physi-

Dec. 1902.] Opinion of the Court.—FULLERTON, J.

cian? We think it does not. This hospital was maintained and the physician provided for the sole purpose of relieving sick and injured employees without expense to them and without any intention on the part of the company of making any profit out of the undertaking. It was therefore a charitable institution and it was supported by the contributions of employees, and carried on in their interests. And if the company did employ the physician, as claimed by respondent, to look after and treat the sick and injured, it is not liable for his negligence, but is responsible only for want of ordinary care in selecting him."

But it must not be overlooked that this expression had reference solely to the facts shown in the record then before the court. In a previous part of the opinion the court stated that there was positive testimony to the effect that the coal company had no physician in its employ and maintained no hospital; that the doctor whose malpractice was complained of was actually employed by a committee of the employees who contributed the funds; that the hospital where the injured employee was treated was under the control of the same committee; that the respondent in that case knew that there was a doctor at the company's mines and some kind of a hospital, and concluded from those facts that the company had contracted to furnish him the privileges of a hospital and the service of a physician. In such a case it was, perhaps, proper to say that, conceding the company was estopped to deny that it employed the physician, it could be held only for want of care in selecting him, for the hospital seems not to have been under the company's control, and the court expressly states that there was no intent on the part of the company to make a profit out of the undertaking. In reality, therefore, the company was merely a trustee of the fund. In the case before us it is conceded that there was some form of contract, the evidence being in dispute only as to its extent.

Furthermore, the employees here have nothing to do with the hiring of the surgeon or with the maintenance of the hospital; nor is the respondent, in any sense, a trustee of the fund it collects. All of the surplus over and above the cost of treating its employees inures to its benefit, and it recognizes no responsibility to account for it to any one. There is therefore in this case both the element of contract and profit, and if there were no other differences, this alone would distinguish the cases. But the case in question was before this court three times, and from the several opinions filed it can be gathered that the court did not intend to lay down the broad rule the respondent contends for. In the first opinion (6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338), this language was used:

“If, on the other hand, the company was conducting a hospital with its own physician for the purpose of deriving profit therefrom, or if it contracted with the appellant to furnish him with the services of a competent physician, and to properly treat him in case of an injury, it would be liable for the negligence or want of skill of its physician in attending him.”

On the second appeal the opinion in consideration was delivered. On the third appeal (18 Wash. 368, 51 Pac. 402, 1046), it was said that the case was really reversed on the second appeal because testimony irrelevant to the issues had been admitted on the trial. The only inference that can be drawn from this is that the court concluded on the second hearing that there was not sufficient evidence to justify a finding on the part of the jury that the company was conducting a hospital for the purpose of deriving a profit therefrom, or that it had contracted to treat the injured employee for his injury. It is not authority for the broad proposition that an employer, where he maintains a hospital for profit, or contracts, for a consideration, to treat his

Dec. 1902.] Opinion of the Court.—FULLETON, J.

sick and injured employees, is not liable for the malpractice of the physician or surgeon he employs, notwithstanding he exercised due care in the selection of such physician or surgeon. On the contrary, the case, as a whole, is authority for the opposite contention; and if in this case the respondent did contract, for a consideration, to treat its employees for any injury they might receive while in its employ, it is liable for the malpractice of the surgeon employed to treat the appellant; and this question, as we say, should have been submitted to the jury.

Was there any evidence of malpractice on the part of the surgeon? The appellant, after being taken to the hospital, was taken in charge by the respondent's surgeon. The surgeon reduced the fracture, and bandaged to the leg, to hold the fractured bones in place, a long splint, reaching from under the arm to the foot; placing the leg, after being so treated, between small sand bags; using no extension or counter extension appliances. It was testified by one of the witnesses that the surgeon stated at the time that this treatment was only temporary, and that he would permanently fix it in the morning, but that in the morning, after an examination, he concluded that it was well enough as it was, and left it in that condition for some three weeks. It further appeared that at the end of that time the surgeon removed the splint, but immediately replaced it, leaving it on the leg for some two weeks more; that he then removed the splint permanently, telling the patient to use the leg as much as possible; that the patient did attempt to comply with the doctor's directions, but found he could not bear any weight upon the leg, could not bear to have it hang down, or even touch it upon the floor; that the doctor thereupon put it in a plaster of paris cast, whereupon the patient was taken to his home, where he remained in bed some ten days more, when the cast was removed.

The leg at that time proved to be very crooked,—“bowed like a barrel stave,” as a witness expressed it,—the foot of the injured leg reaching only to the ankle of the other. A consultation with other physicians was then held, when it was decided that a further operation was necessary. The appellant was then taken back to the hospital, the leg straightened and dressed with suitable splints, and an extension appliance applied thereto. The patient then remained in the hospital for six weeks more, when the splints were removed and the leg placed in a plaster of paris cast, which was left thereon some ten weeks. When this was removed the leg was found to be somewhat shrunk-en in size, something like an inch shorter than the other, and the knee joint affected; not locking or catching as it should, so that when walking it falls back out of a proper line some three or four inches. It was testified by the two expert witnesses called by the appellant that a fracture such as the appellant had, being an oblique fracture in the lower third of the femur, was a difficult one to treat, owing to the difficulty of maintaining the fragments in their proper position. That there were several methods used in practice, and sanctioned by authority, for treatment of such fractures, and that from any of them bad results were not uncommon. It was testified, also, that a shortening of the leg was to be expected, that a shrinking of the limb was almost a necessary consequence, and that the affection of the knee joint was not an evidence of bad surgery. They also said, in effect, that the final result in the appellant’s case was not worse than might have been expected from the nature of the injury. One of the witnesses, on cross-examination, said that the treatment of the injury applied by the first surgeon was sanctioned by some authority, and that he thought he had seen very good results obtained by such treatment; the other, that it was not

Dec. 1902.] Opinion of the Court.—FULLETON, J.

the usual method of treating oblique fractures of the femur in an adult person; that in such cases it is difficult to hold the fracture in place or prevent curvature, and that extension and counter-extension appliances are usually employed for these reasons; that there were no splints known that would overcome the ordinary contraction of the muscles in an adult muscular person; and that, the more muscular a patient is, the more difficult it is to overcome or prevent such contraction. It was also shown that the respondent at the time of the injury was about thirty years of age, was unusually muscular, and that he had theretofore always enjoyed good health.

It was on this branch of the case that the trial judge sustained the challenge of the respondent to the sufficiency of the evidence. From his remarks when passing upon the motion, it would seem that he reached this conclusion from the fact that the appellant's expert witnesses testified that bad results were liable to follow from this character of injury, no matter how skillfully the injury may be treated, and that the results finally obtained were not worse than might have been expected. But it seems to us that this is not conclusive of the respondent's liability. To secure the result finally obtained, the appellant was obliged to submit to a second operation, with its accompanying dangers, delay in recovery, and consequent pain and suffering. This was claimed as an element of damage in the complaint; and, if it was made necessary by the maltreatment of the surgeon first in charge, it can be recovered for, no matter how successful the final operation was. The contract implied by law from the mere employment of a surgeon is that he will treat the injury he is employed to treat with ordinary diligence and skill. This requires that he bring to its treatment such a degree of skill and diligence as surgeons practicing in the same general

neighborhood, in the same line of practice, ordinarily have and exercise in like cases. He must not experiment in his treatment of the injury. On the contrary, if he desires to avoid liability for his mistakes, he must treat it in some method recognized and approved by his profession as most likely to produce favorable results. If there be more than one of these applicable to the particular case in hand, he is not, of course, liable for an honest mistake of judgment in his selection of the method; but if bad results follow, and liability therefor is to be avoided, it must appear that the treatment applied was approved and recognized, as well as that is was pursued with ordinary diligence and skill. Here the evidence does not fully meet these requirements. While one of the surgeons does say that the treatment first applied was approved by some authority, and that he had seen good results follow from it, he does not say that it was the usual method of treating such fractures, or that he approved of the practice in any case. Much less does he say that it was proper treatment for the case in hand. He was one of the consulting surgeons who advised the second operation, and the one who seems to have had it in charge. It is worth noticing, at least, that he did not, in his treatment of the injury, pursue the treatment adopted by the first surgeon; and it will be remembered that the other surgeon testified unqualifiedly that it was not the usual method of treatment, and that the surgeon in charge seems to have been of the opinion, on first thought, that the treatment was not sufficient for the particular injury. The fact, also, that a second operation was necessary to obtain the results finally obtained is some evidence that the original attempt was not performed with that degree of skill which a surgeon ordinarily brings to the treatment of such an injury. On the whole, therefore, we think there was some substan-

Dec. 1902.] Opinion of the Court.—FULLETON, J.

tial evidence to the effect that the appellant had been subjected to unnecessary danger, delay in recovery, and pain and suffering, and that for these injuries he was entitled to recover.

In view of the line of argument pursued in the appellant's brief, and the fact that the cause must be remanded for a new trial, it is well to say that the respondent did not, by its contract, undertake to effect a cure of the appellant's injury, or restore his broken limb to its normal condition. It was in nowise responsible for the original injury, and it undertook only to bring to its treatment that ordinary diligence and skill which surgeons usually exercise in similar cases; and, if it did this, it is not responsible for the results. But, if it did not so treat it, it is responsible only for the injury its failure to do so entailed, not for the injury as a whole. Its liability is measured by its own dereliction of duty, not for everything the appellant may have lost or suffered because of the accident. It is well to say, also, that what we have said concerning the evidence is not to be taken as conclusive of the question discussed. What we mean is that the evidence presents questions upon which the appellant was entitled to the judgment of the jury whether or not he had suffered a damage at the hands of the respondent, not that his right of recovery is conclusively established.

The judgment is reversed and the cause remanded for a new trial.

REAVIS, C. J., and DUNBAR, MOUNT and ANDERS, JJ., concur.

[No. 4454. Decided December 6, 1902.]

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CHARLES L. MORTON, *Respondent*, v. MORAN BROS. COMPANY, *Appellant*.

INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

The question of plaintiff's contributory negligence was properly submitted to the jury, where it appeared that he was ignorant of the hazards incident to work aboard ship, and was taken by the foreman of defendant company away from his work in the foundry to help make repairs on a vessel; that the foreman went into the lower between-decks with a lighted candle, and after an examination returned, and ordered plaintiff to carry some boards down there by means of a ladder which the foreman had placed; that plaintiff started down with a board and a lighted candle which he held by means of one arm and hand, and when near the foot of the ladder it tilted, and, fearing a fall, he stepped off the side of the ladder and fell to the bottom of the vessel through a hole located close to the foot of the ladder; that the hole was not visible by reason of the darkness, but was known to the foreman, and he had failed to warn plaintiff of it.

SAME — EXCESSIVE DAMAGES.

Where there is no evidence of passion or prejudice on the part of the jury, and where the trial judge, who has seen the witnesses and heard the testimony, has refused a new trial urged on the ground of excessive damages, the supreme court will not interfere with the verdict.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Affirmed.

Preston, Carr & Gilman and *R. S. Eskridge*, for appellant.

Wilshire & Kenaga, for respondent.

The opinion of the court was delivered by

MOUNT, J.—Action for personal injuries. Upon a trial of this case in the court below the jury returned a verdict

Dec. 1902.] Opinion of the Court.—MOUNT, J.

for \$2,500 in favor of the plaintiff. The lower court denied a motion for a new trial, and thereupon entered judgment against the defendant for the amount of the verdict. From this judgment defendant appeals.

Two questions are presented here: (1) That the court erred in denying defendant's motion for a nonsuit at the close of plaintiff's evidence, which was renewed at the close of all the evidence; and (2) that the verdict is excessive. The negligence and the injury complained of are alleged in the complaint as follows:

"That on the 18th day of October, 1901, while plaintiff was so engaged as aforesaid, the defendant, being short of help, removed plaintiff, without his consent, from said work as a molder's helper, and ordered him to immediately go to work on the steamship 'Elbe,' then lying for repairs at a wharf of said defendant near said ship yard in the city of Seattle, and ordered plaintiff to go to the lower between-decks on said ship, where it was dark and dangerous, and the dangers concealed, which conditions were well known to defendant, but unknown to plaintiff, and where there was a dark and dangerous hole, which was known to defendant but unknown to plaintiff; and directed plaintiff to carry some lumber down to said lower between-decks on said ship by a certain ladder extending down from between-decks to lower between-decks, placed there as hereinafter stated, by the foreman in charge of said work for the defendant.

"That plaintiff had never before worked on a ship, and never before been below the passenger deck on a ship, and knew nothing about the dangers or hazards to which a workman on board ship was exposed, but the defendant, well knowing the dangers aboard a ship, and the dangers and hazards incident to such work on said ship, and well knowing the plaintiff's lack of skill and lack of any knowledge in regard thereto, and well knowing plaintiff's ignorance of any danger or dangers to which he was, or would be, exposed while at labor aboard said ship, and in going to and

from the place to which he was directed to go on said ship, recklessly, wrongfully, carelessly, and negligently ordered him to do said work, and to go into the lower between-decks of said vessel down said ladder, without giving him any caution or warning whatsoever of the dangers incident to such place and to such work; the defendant full well knowing that said dangers were concealed, and that plaintiff was in ignorance thereof.

"That on the 18th day of October, 1901, while the plaintiff was working under the express direction and orders of defendant's foreman, he went aboard said vessel with said foreman in obedience to an immediate order, thence with him down from the main deck on a ladder in a hatchway to between-decks of said vessel, and from there said foreman directed plaintiff, who was then still on the between-decks, to go up and get boards for staging, and bring them down to lower between-decks where said foreman then was. That plaintiff, in immediate obedience to said order, went up to the maindeck, and returned thence with a short piece of board to the ladder going down from between-decks to lower between-decks, and then started to descend said ladder, believing the same to be safe, and in ignorance of the recklessness, carelessness and negligence of the defendant in placing said ladder as hereinafter stated, and in ignorance of the dangers of the place to which he was directed to go, when, by reason of the recklessness, carelessness, and negligence of said defendant, said ladder turned, and plaintiff was thrown off, and he fell down through said dark and dangerous hole in said lower between-decks of said vessel, so left open as hereinafter stated, into the hold of said vessel, a distance of twenty feet, by which the collar bone of plaintiff was broken, his ribs on the left side lacerated, bruised, and mangled, his knee lacerated, bruised, and sprained, and the plaintiff greatly injured.

"That the ladder from which plaintiff was thrown as aforesaid, was the only way by which plaintiff could get to lower between-decks in obedience to defendant's order, and was placed by said foreman of the defendant in a reckless, careless, and negligent manner, so that the foot of the same

Dec. 1902.] Opinion of the Court.—MOUNT, J.

stood in a dangerous and uneven manner on a narrow cross piece over said dark and dangerous hole in lower between-decks, which was extremely dangerous, and of which the plaintiff had no knowledge, and could have had no knowledge whatsoever. That said ladder extends from between-decks to lower between-decks. That it was so dark that plaintiff could not see the bottom of said ladder, nor its condition as to safety, nor that it was resting on a narrow cross piece over a hole. That defendant well knew the dangers attendant upon the work it directed plaintiff to do, and of the place at which it directed plaintiff to do said work, but the same were wholly unknown to the plaintiff."

Respondent's evidence was substantially as follows: On October 11, 1901, he was employed by appellant's foreman, Mr. Fox, to assist in molding frames on shore at appellant's ship yard. After working at this employment for several days, Mr. Fox took respondent, with some other men, and set him to work on the Japanese ship Kaga Maru, which was lying at appellant's wharf for repairs. This was the only time respondent had been about any ship at appellant's yard. He had never worked on board a ship before, nor had he ever been below the passenger cabins on any ship. On the morning of October 18, 1901, foreman Fox directed the respondent to take some tools, and go to the wharf where the German steamship Elbe was lying in charge of appellant for repairs. In obedience to this direction, respondent took the tools and went to the wharf, where he was joined by other workmen in company with foreman Fox, who conducted respondent upon the steamship Elbe to the main deck. From this main deck, by means of a ladder, they were conducted to the deck below, called the "between-deck." When they arrived at the between-deck, foreman Fox took the ladder from the main hatch, and placed it down through the between-deck hatch to a deck below called the "lower be-

tween-deck," and he and another foreman of appellant, Mr. Rayfield, went down the ladder to the lower between-deck. It was dark on the between-deck except immediately under the main hatch, and candles were used for light. On the lower between-deck it was totally dark. Mr. Fox and Mr. Rayfield took lighted candles with them to the lower between-deck. When they arrived there, respondent was still on the between-deck. Mr. Fox, from below, directed respondent to get another ladder. Respondent thereupon took the ladder up from the lower between-deck, and placed it above in the hatch of the main deck, and started to go up to the main deck, when some one handed him another ladder. He thereupon handed this ladder down to Mr. Fox on the lower between-deck and Fox placed it where the other ladder had been from the between-deck to the lower between-deck, resting the top of the ladder on the after edge of the between-deck hatch, with the foot toward the bow of the ship. Respondent then started to go down this ladder to the lower between-deck, where Fox and Rayfield were, but before he had gone far down the ladder Fox ordered him to get some short pieces of board five or six feet long, and bring them down there. Respondent went ashore by way of the ladder to the main deck, and soon thereafter Fox and Rayfield came up from the lower between-deck. Respondent returned from shore with three pieces of plank, to the main deck. At the main deck he got a candle, lighted it, and went down to the first between-deck. There he left two of his boards, and started down the ladder to the lower between-deck, carrying the board under his right arm, the candle in his right hand, and using his left to hold on to the rungs of the ladder. He was accustomed to use his left hand. He proceeded down the ladder until his head was below the level of the between-deck and his feet were nearly to the bottom rung

Dec. 1902.] Opinion of the Court.—MOUNT, J.

of the ladder, when the ladder tilted toward him sidewise, and, in order to avoid a fall, he attempted to step out and down to the floor of the deck, which he supposed was there, but, instead of a floor, the foot of the ladder was near an opening, into which respondent stepped, and was precipitated to the bottom of the ship. As he fell he struck some iron beams, and fell head first some twenty feet below, bruising his leg and side and breaking a piece out of his collar bone. Fox knew of the opening, and that the same was within twelve or fourteen inches of the foot of the ladder, and had given the respondent no caution or warning against the same. Respondent did not know of the opening, and could not see it, but supposed the lower between-deck was floored over the same as the between-deck.

We think this evidence was sufficient to take the case to the jury. The fact that the ladder was placed in a dangerous place, at the foot of which was a hole of which foreman Fox knew and of which the respondent did not know, and which he could not see and was not informed about, was proof of negligence of the foreman imputable to the appellant, and was sufficient to make a *prima facie* case for the jury. It is argued that the respondent could have thrown the boards down to the lower between-deck from the between-deck and thus have avoided the injury; but, where respondent was not directed to do so, but was ordered to go and get boards and bring them down, he had a right to obey the order as given, and also had a right to rely upon the foreman to inform him of hidden danger of which the foreman knew and the respondent was not aware. The danger was not apparent, according to the respondent's evidence, but was hidden in the dark, so that he could not see it. The evidence shows that, while respondent was not experienced in work on board ships, he had been accustomed to working in dark places on lad-

ders in mines. And whether he was or was not experienced in such work, it seems to us makes little difference in this case. The foreman, Fox, had gone down the ladder ahead of him, had been down there some minutes making an inspection of the premises, and had come out. Respondent had seen him go down and knew he had come out. He therefore certainly had a right to believe that, if there were any dangers in descending the ladder, or conditions at the foot of that ladder were different from those at the foot of the one he had already descended, which would render it unsafe for a stranger to the premises to go down upon it, the foreman would so inform him. The respondent was not sent below for the purpose of examining for dangers. The foreman had preceded him for that purpose and other purposes and had directed respondent to take some boards down. Under these circumstances this case does not fall within the principle announced in *Anderson v. Inland Telephone, etc., Co.*, 19 Wash. 575 (53 Pac. 657, 41 L. R. A. 410), relied upon by appellant. It is, no doubt, true that all employees at all times must use their senses so as to avoid dangers. But the respondent in this case could not see where he was going. It was dark below. The foreman had been down there, and had returned without informing respondent of the dangerous opening at the foot of the ladder, and therefore respondent had a right to presume that no danger existed there. *Johnson v. Tacoma Mill Co.*, 22 Wash. 88 (60 Pac. 53). Under these circumstances the court could not say as a matter of law that the respondent was guilty of contributory negligence, or that he did not act as an ordinarily prudent person would have acted, and, we think, properly submitted the case to the jury. *Christianson v. Pacific Bridge Co.*, 27 Wash. 582 (68 Pac. 191).

Where there is no evidence of passion or prejudice on the

Nov. 1902.]

Syllabus.

part of the jury, and where the lower court has seen the witnesses and heard the evidence, and has refused to grant a new trial on the ground of excessive damages, we do not feel disposed to disturb the judgment on this account.

The judgment is therefore affirmed.

REAVIS, C. J., and FULLERTON, DUNBAR and ANDERS, JJ., concur.

[No. 4455. Decided December 6, 1902.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN W.
ELLIS, *Appellant*.

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**MURDER — SELF-DEFENSE — EVIDENCE — REPUTATION OF DECEASED —
ADMISSIBILITY.**

In a prosecution for murder, where the plea of self-defense was interposed, it was error to exclude testimony as to the general reputation of the deceased as to resorting to the use of firearms and other deadly weapons when engaged in quarrels, although defendant's knowledge thereof had not been previously shown as a foundation for such proof, where the only objection to the question was general and not merely to the order of the proof.

SAME.

Evidence of the habit and reputation for carrying and using deadly weapons may be received where the nature of the defense indicates that the defendant had reasonable apprehensions of great danger to his person, and the exclusion of such evidence will not be held to be without prejudice because of the fact that ample testimony of the reputation of the deceased as an aggressive, quarrelsome, dangerous, fighting man had been introduced.

SAME — APPARENT DANGER — INSTRUCTIONS.

Where the defense of justifiable homicide is interposed, it was error to charge the jury that they could not consider threats against defendant nor the dangerous character of the deceased, unless they found that immediately preceding the killing the deceased had committed some overt act towards carrying his threats

Opinion of the Court.—REAVIS, C. J. [30 Wash.

into execution, or had made an attack upon the defendant of such a character as would justify the defendant in using deadly weapons in repelling the same, since it is sufficient to excuse homicide if the danger be apparently imminent.

Appeal from Superior Court, Kittitas County.—Hon. FRANK H. RUDKIN, Judge. Reversed.

Graves & Englehart, for appellant.

Clyde V. Warner, Prosecuting Attorney, *H. J. Snively* and *Austin Mires*, for the State.

The opinion of the court was delivered by

REAVIS, C. J.—Defendant was charged in the superior court of Kittitas county with murder in the first degree, and he was convicted of manslaughter. At the trial the fact of the homicide was admitted. The plea of self-defense was interposed by the defendant, and this was the only issue tried. Evidence was given tending to show that deceased had the general reputation of a dangerous, quarrelsome, and fighting man; that he had before threatened to kill defendant; that such reputation and threats were known to defendant before the shooting, and that deceased had several times made such threats to defendant; that on the day of the homicide, and a few hours prior to its occurrence, deceased challenged defendant to settle their dispute "by shooting it out;" that at the same time he held a pistol in his hand, and that defendant at the time kept deceased "covered" with a pistol. Witnesses were produced by defendant who testified to the general reputation of deceased, and, as the record here shows, the following question was propounded to each: "Do you know the general reputation of deceased, during such times, in such communities, as to being an aggressive, quarrelsome, dangerous, fighting man, and, when engaged in quarrels and

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

fights, his reputation and his habit as to using fire-arms and other deadly weapons?" Objection was sustained to the following portion of the question: "and, when engaged in quarrels and fights, his reputation and his habit as to using fire-arms and other deadly weapons." The question, as amended, was then answered by each witness, "Yes." The following question was then propounded by defendant to each of said witnesses: "What was that reputation, good or bad?" To which each of said witnesses answered, "Bad." The following question was then propounded by defendant's counsel to each of said witnesses and to defendant: "Do you know the general reputation and the habit of the deceased, during the times and in the communities you have stated, as to resorting to the use of fire-arms and other deadly weapons when engaged in quarrels?" To which question the state by its counsel objected, and such objection was sustained by the court. The defendant testified that just preceding the shooting deceased accosted him with threats and "spit in his face," and made a gesture as if to draw a pistol. The court at the request of counsel for the state gave the following instructions:

"1. I instruct you that if you believe from the evidence that deceased threatened to take the life of the defendant prior to the alleged killing, that this would give the defendant no right to take the life of the deceased, unless you further believe that at the time of the alleged killing the deceased was making or immediately preceding the killing had committed some overt act towards carrying such threats into execution.

"2. I instruct you that the evidence respecting the dangerous character of the deceased can only be considered by you in the event of your finding from the evidence that deceased was making or had made, immediately preceding the alleged killing, an attack upon the defendant of such a

character as would justify the defendant in using deadly weapons in repelling the same."

1. The defendant assigns as errors the rejection of the evidence of the reputation of deceased for, and his habit of, using fire-arms and deadly weapons in quarrels and fights, and the giving of the two instructions set out above, and also misconduct of a juror. It is urged by counsel for the state that a proper foundation was not laid for the introduction of the evidence relating to the reputation of the deceased for carrying and using weapons in his quarrels, in that it was not shown that defendant knew such reputation and habits. But the objection to the question was general and not merely to the order of the introduction of proof. It may also be observed that such evidence may tend to enlighten the jury as to who was the aggressor in the encounter. *State v. Cushing*, 14 Wash. 527 (45 Pac. 145, 53 Am. St. Rep. 883).

It is readily perceived that the real issue at the trial was, did the facts as they appeared to the defendant at the time of the homicide justify an ordinarily prudent man in believing he was in imminent danger of death or serious bodily injury? If they so appeared to the defendant, he was excused for the commission of the homicide. The right of self-defense permits one to act honestly upon the apparent danger to which he is exposed at the time. It seems that evidence of the habit and reputation for carrying and using deadly weapons may be received where the nature of the defense indicates that the defendant had reasonable apprehensions of great danger to his person, and they are pertinent for the same reason that general reputation of bad character and threats uttered by the deceased are received. The rule is well stated in *Quesenberry v. State*, 3 Stew. & P. 308, as follows:

"If the killing took place, under circumstances that

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

could afford the slayor no reasonable grounds to believe himself in peril, he could derive no advantage from the general character of the deceased for turbulence and revenge. But, if the circumstances of the killing were such as to leave any doubt whether he had not been more actuated by the principle of self-preservation than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motive by which he had been actuated."

It is also very generally approved: *Horbach v. State*, 43 Tex. 242; *Daniel v. State*, 103 Ga. 202 (29 S. E. 767); *State v. Graham*, 61 Iowa, 608 (16 N. W. 743); *Payne v. Commonwealth*, 1 Metc. (Ky.) 370; *Moriarty v. State*, 62 Miss. 654; *State v. Elkins*, 63 Mo. 159.

The defendant's testimony made the evidence tendered relevant and material. *State v. Cushing*, 14 Wash. 527 (45 Pac. 145, 53 Am. St. Rep. 883).

It is suggested by counsel for the state that ample testimony to the reputation of the deceased as an aggressive, quarrelsome, dangerous, fighting man was introduced, and that the exclusion of the evidence relating to his reputation and habit of carrying and using deadly weapons when engaged in quarels was inconsequential, and worked no prejudice to defendant. But it is apparent that a man who habitually carries and uses such weapons in quarrels must cause greater apprehension of danger than one who does not bear such reputation and does not have such habits. The vital question is the reasonableness of the defendant's apprehension of danger, and his good faith in acting upon such apprehension. The jury are entitled to stand as nearly as practicable in the shoes of defendant, and from this point of view determine the character of the act. The exclusion of the evidence tendered in this regard was error.

The general instructions given by the court stated fairly the law of self-defense, but the two set out above and ob-

jected to by defendant are defective and misleading. It is the imminent *apparent* danger, not *real*, the jury must find to excuse the homicide. The two instructions taken together require the finding by the jury of a preceding attack or overt act, at the time, before the dangerous character and threats of the deceased can be considered. On the contrary, the apparent facts should all be taken together to illustrate the motives and good faith of the defendant at the time of the homicide. As a new trial must be awarded for the two errors discussed, and it is not probable that the controversy over the misconduct of the juror will arise again, and as the last error is assigned upon the facts shown by somewhat conflicting affidavits, such error need not be further noticed.

Reversed and remanded for a new trial.

FULLERTON, MOUNT, DUNBAR and ANDERS, JJ., concur.

[No 4812. Decided December 8, 1902.]

WHITE CREST CANNING COMPANY, *Appellant*, v. E. A.
SIMS *et al.*, *Respondents*.

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TRIAL — FINDINGS OF FACT — EQUITABLE ACTIONS.

The statute requiring the court to file findings of fact is inapplicable to actions of equitable cognizance.

SAME — SIGNING JUDGMENT — NOTICE.

The trial court may properly sign its judgment on the day of rendition, without any necessity of notice thereof being given to the losing party.

FISHING — LOCATION OF TRAPS — VALIDITY.

Where the location of a fishing trap was invalid by reason of the site being occupied by a prior locator, such invalid location could not ripen into a valid location at the expiration of the prior locator's fishing license under which he fished that site.

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

SAME.

Where an attempted location of a fishing site is invalid as against original locators thereon it cannot be valid as against anybody else.

SAME — ABANDONMENT — SUFFICIENCY OF EVIDENCE.

In an action to enjoin defendants from operating a fishing trap upon a certain location claimed by plaintiff as a prior locator, a finding that such location had been abandoned was warranted, where it appeared that the site was located in March by plaintiff's assignors by driving piles and posting thereon the number of the locator's license; that nothing more was done by the locators thereon, nor their license even recorded; that in the latter part of September of the same year, defendants located the same site and at that time found no posts or piles on the site to indicate that it was held by other locators.

Appeal from Superior Court, Island County.—Hon. GEORGE C. HATCH, Judge. Affirmed.

Thomas Smith and Kerr & McCord, for appellant.

A. W. Buddress, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This is an action brought by the plaintiff (appellant) against the defendants (respondents) to enjoin them from infringing upon a certain fishing location claimed by the plaintiff. Plaintiff alleged that it was the owner of said fishing location by virtue of a strict compliance with the laws of fishing locations, and that the defendants, without right and in violation of law, had infringed upon and taken possession of said location and excluded the plaintiff therefrom; that the plaintiff's location was established on the 7th of March, 1901, and that the defendants' location was attempted to be established in September, 1900; and that, at the time of the attempted establishment by the respondents, the location was held by the firm of Davis & Myers. The answer denied generally

Opinion of the Court.—DUNBAR, J. [30 Wash.

the allegations of the complaint, and set up as an affirmative defense the establishment of the location by the respondents on the 29th of September, 1900, and denied that there was any location by any one of the territory upon which their location was established. The reply was a general denial of the affirmative allegations of the answer. Upon these issues the trial was had, and judgment was entered dismissing the cause; no findings of fact or conclusions of law being made by the court.

The first assignment is that the court erred in dismissing plaintiff's complaint without giving plaintiff any opportunity to prepare, propose, or file findings of fact or conclusions of law. While the record does not disclose the fact that plaintiff did not have an opportunity to propose findings of fact, we have frequently held that the statute in relation to findings of fact does not apply to equitable actions. *Knowles v. Rogers*, 27 Wash. 211 (67 Pac. 572); *Wintermute v. Carner*, 8 Wash. 585 (36 Pac. 490).

The second assignment is that the court erred in signing the judgment on the same day it rendered its opinion, without notice being given to the plaintiff. This is not error, under the rule announced by this court. *Brooks v. James*, 16 Wash. 335 (47 Pac. 751).

The other errors alleged reach to the merits of the case, and are discussed by the appellant under the three following propositions or interrogatories submitted by him, viz.: (1) Davis & Myers having a valid location on the ground, could the defendants go upon the same and make a valid location on September 29, 1900? (2) If they could not make a valid location on September 29, 1900, as against Davis & Myers, was it a valid location against anybody else, except the said original locators? (3) Whether, if the location of the defendants were an invalid location on September 29, 1900, at the time it was attempted to be

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

made, would it ripen into a valid location at the expiration of Davis & Myers' license on February 13, 1901? It will be observed that appellant's claim to the location rests upon the alleged fact that, at the time the respondents made their location, the ground was occupied by Davis & Myers. In answer to the third interrogatory, we should say that the legality of the location of the respondents depended upon the condition of facts existing at the time the location was made, and its validity or invalidity could not be affected by the expiration of Davis & Myers' license, or any other subsequent happening; and, as to the second, that if respondents could not make a valid location on September 29, 1900, as against Davis & Myers, they could not make a valid location at all at that time; and if the correctness of the first proposition is assumed, viz., that Davis & Myers had a valid location on the ground on September 29, 1900, the respondents could not go upon the same and make a valid location. But this is assuming the very pith of this controversy. Davis & Myers had started to establish a location in 1899, and re-established the same in February, 1900, by driving some posts and posting their number. But it is very stoutly contended by the respondents that this location was abandoned by Davis & Myers between that time and the time of their location in September. The respondents, upon making their location, complied with all the requirements of the law, both as to driving piles and posting the notices and recording their license. No license was on record by Davis & Myers at the time of the location by the respondents. We are not prepared to say that the record of the licenses is required as a prerequisite to fishing the ground located; but it would certainly be an additional security to the locator, which ought not to be neglected. It is the contention of the respondents that at the time they located their trap there was not only no record notice of the

location by Davis & Myers, or by any one else, but there was no notice of any kind ; no posts or piles being driven or appearing upon the location, or within a great distance thereof. The license provided for by the statute is a roving license, and the location by virtue thereof may be established anywhere after it is obtained, and the recipient of the license can only be protected in the exclusive right to fish by complying with the law. There is no such thing as exclusive jurisdiction, so far as time is concerned. In fact, the legislature has carefully refrained from giving any one exclusive jurisdiction of the territory. The testimony on this proposition, which is the pivotal one in the case, is exceedingly conflicting, and a review or analysis of it would not be profitable; but, from a perusal of the record, we think the trial judge was justified in rendering the judgment which he did,—that there was a practical abandonment of the disputed territory by Davis & Myers, and that the ground was open to location by the respondents.

The judgment will be affirmed.

REAVIS, C. J., and FULLERTON and MOUNT, JJ., concur.

[No. 4484. Decided December 8, 1902.]

EMANUEL ANDERSON *et ux.*, *Appellants*, v. WILLIAM P.
HARPER, *Respondent*.

PLEADINGS — AMENDMENT DURING TRIAL.

The refusal of the court to permit plaintiffs to amend their complaint during trial does not show abuse of discretion, when the amendment would introduce a new element of damages in addition to those claimed in the complaint.

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

SAME — DISPUTED CONTRACT — EVIDENCE OF SURROUNDINGS.

Where the pleadings put in issue the terms of a contract between the parties, evidence of circumstances surrounding the contract is admissible.

CONTRACT TO ERECT BUILDING — ACTION FOR BREACH — EVIDENCE.

In an action for damages for failure to construct a building on community property according to contract, the wife cannot object to evidence of alterations made under an oral agreement in which she had not joined, since she would be bound by any contract made by her husband for the benefit of the community property.

SAME — STRIKING ALLEGATIONS OF REPLY.

The striking out of affirmative matter in the reply cannot be urged as error, when there was no testimony on the subject of the stricken matter.

SAME — INSTRUCTIONS — EXCEPTIONS.

Where the court had charged the jury that "unless the plaintiffs have established to your satisfaction by a preponderance of the evidence that there was a substantial failure on the part of defendant to comply with his contract, your verdict must be for defendant," an exception thereto which recites that plaintiffs except to "that part of the instructions wherein the judge says that if the defendant has substantially performed his agreement," etc., was not properly taken, since it attributes to the court language not used by it and which conveys a different meaning than that employed.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Affirmed.

Othilia G. Carroll and Carroll & Carroll, for appellants.

McClure & McClure, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The substance of the complaint in this case is that the appellants are owners of a certain lot in the city of Seattle, and that they engaged respondent to effect a loan and construct a dwelling house thereon. Respondent was to have the exclusive management of the financing and construction of the house. The plans and

specifications were agreed upon, and the construction of the house was proceeded with to completion under respondent's supervision. It is alleged that the respondent did not construct the dwelling according to the contract, specifications, and plans thereof; that, owing to the poor construction of said dwelling and consequent exposure to cold and dampness, appellants were made sick; and that, because of respondent's negligence in locating the house upon the lot, the house had to be removed, to their damage; and demand is made for the recovery of damages for breach of the contract. The respondent admits the employment, but denies that he was to build under any particular specifications, and alleges that the house was to be a duplicate of a certain other house agreed upon by the parties to the contract; that he did build the house according to the contract, and that the appellants accepted the same; that a complete settlement was made, and the amount found due the respondent was paid to him by the appellants. The affirmative allegations of the answer were denied by the reply, and affirmative matter set up in the reply, which was afterwards stricken out by the court on motion of the respondent. The cause went to trial, and a verdict was rendered in favor of defendant.

Appellants' first assignment of error is the action of the court in refusing their application for leave to amend their complaint so as to include damages for delay in the completion of their dwelling. This would have introduced into the trial a new element of damages, which the defendant had not had an opportunity to answer, and the discretion of the trial court in permitting or refusing amendments during the trial is so large that this court has never interfered with it, except when it appeared that such discretion was abused. A perusal of the pleadings as

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

a whole does not convince us that the court abused its discretion in overruling this motion.

We think there is no merit in the second contention,—that the court erred in allowing the introduction of certain testimony. The testimony was an explanation, offered by respondent, of circumstances surrounding the contract, and, as there was a direct conflict between the allegations of the complaint and the answer in regard to what the contract was, we think the testimony was admissible.

As to the third assignment there was no error in permitting respondent to prove an alleged oral agreement to which the wife was not a party, for, in any event, the wife would be bound by any contract made by her husband for the benefit of the community property, and she would also be estopped, under the testimony in this case, from refusing to pay for the changes made, after standing by and seeing the work expended.

The record in this case is so indefinite that it is difficult to tell what instructions were excepted to by the appellants. Many of the instructions which the court refused to give, and which refusal is assigned as error by the appellants, were, in substance, given by the court, and we have uniformly held that the court is not required to announce the law in any particular form of words. This, we think, applies to the fifth and sixth instructions asked by the appellants, and the fourth instruction asked for was properly refused for the reason that there was no attempt on the part of the respondent to prove that he had built according to the plans and specifications alleged in appellants' complaint. The sixth instruction was substantially given by the court. The court's instructions are too long to set forth in this opinion, but we think the law governing the case was properly announced in such instructions. The affirmative matter of the reply was properly stricken out

for the reason that there was no testimony on the subject embraced in the reply, and that therefore there was no contention in that regard. There were no proper exceptions taken to appellants' assignments of error numbered 10, 11, 12 and 13. With reference to assignment 10 the court instructed the jury, among other things: "Unless the plaintiffs have established to your satisfaction by a preponderance of the evidence that there was a substantial failure on the part of Harper to comply with his contract, your verdict must be for the defendant." The exception to this instruction was as follows: "Plaintiffs except to that part of the instructions wherein the judge says that, if the defendant has substantially performed his agreement," and, continuing, the exception is as follows: "and that plaintiffs except to that part of the instructions in relation to the settlement between plaintiffs and defendant, and plaintiffs except to that part of the instructions wherein he said that, if defendant has shown that he has substantially duplicated the Edwards house," and that is the extent of the record as showing exceptions to the instructions given. It will be seen that the court did not use the language attributed to it by the appellants, viz., "has substantially performed his agreement." There might, and probably would, be a difference between the substantial performance of his agreement and the substantial failure to comply with his contract. But even if the exception were properly taken, we think the instruction of the court was correct. The instructions of the court presented all the claims of the appellants to the consideration of the jury, and, considering the whole instructions together, no error was committed either in the giving or refusing of instructions.

An examination of the testimony in the cause convinces

Dec. 1902.]Opinion Per Curiam.

us that sufficient testimony went to the jury to warrant the verdict which was rendered.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS and MOUNT, JJ., concur.

[No. 4816. Decided December 9, 1902.]

THE STATE OF WASHINGTON, *Appellant*, v. ORRAN MURREY *et al.*, *Respondents*.

CRIMINAL LAW — APPEAL BY STATE.

Under Bal. Code, § 6500, subd. 7, restricting the state's right of appeal in criminal cases to orders setting aside the indictment or information, orders arresting judgment on the ground the facts do not constitute a crime, or some material error in law not affecting the acquittal of the prisoner on the merits, the state has no right of appeal, where defendants, who have been discharged on habeas corpus, thereafter procure a dismissal of the proceedings against them and are awarded a judgment for costs on their preliminary examination.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Appeal dismissed.

George H. Funk, Prosecuting Attorney, for the State.

Frank C. Owings and *Troy & Falknor*, for respondents.

PER CURIAM.—In November, 1901, a criminal complaint was filed in the office of the justice of the peace of Thurston county, charging Murrey and O'Neil with stealing a certain cow. The defendants were arrested on warrant, and, after examination before the magistrate, were held to appear before the superior court. At the preliminary examination, defendants produced a number of wit-

nesses, who testified therein. Subsequent to the examination, and before any information was filed against defendants or either of them, they made a motion to dismiss the proceeding, and for their costs and disbursements in the examination; that is, the fees of the witnesses for defendants at the examination. This motion for dismissal and for costs was based upon the fact that the superior court had, upon a proceeding in habeas corpus, after a full examination of the facts, entered judgment discharging the defendants. The motion was sustained, and the court entered an order purporting to dismiss the preliminary proceeding, and entered judgment against the county and in favor of defendants in the sum of \$60.80, being the fees of the witnesses produced by defendants at the preliminary examination. From this order the state attempts to appeal.

Respondents move to dismiss the appeal for want of jurisdiction in this court to review such proceeding. The errors assigned are in entering the order of dismissal, and in taxing to the county the costs of defendants' witnesses at the preliminary examination. The statute (§ 6500, Bal. Code), limits the right of the state to appeal in criminal cases: (1) In setting aside the indictment or information; (2) arresting judgment on the ground that the facts stated in the indictment or information do not constitute a crime; (3) or in some other material errors in law not affecting the acquittal of the prisoner on the merits. It is apparent that this appeal cannot be maintained under the first or second specification. The judgment and order entered was an adjudication upon the merits of the charge against the defendants; therefore the state has no right of appeal under the third specification, because the error of law mentioned cannot affect the acquit-

Dec. 1902.]

Syllabus.

tal of the prisoner on the merits. It seems that the order of dismissal taxed costs in the amount of \$60.80 to the county. It is immaterial, in the disposition of the motion to dismiss this appeal, to express any view upon the validity of the taxation of costs. In any view, the claim for costs, which here, if valid, can only be a debt, is under \$200. It is apparent no controversy now exists between the state and the defendants. In the habeas corpus proceeding such controversy was ended.

The motion to dismiss is sustained.

[No. 4418. Decided December 9, 1902.]

KOYUKUK MINING COMPANY, Appellant, v. A. T. VAN DE VANTER *et al.*, Respondents.

CONVERSION — CUSTODY OF GOODS — EVIDENCE — ACTS OF AGENT — LIABILITY OF PRINCIPAL.

Where the business of acting as custodian of goods attached by a sheriff was entirely foreign to the character of business carried on by a corporation, and it had never authorized its agent to act in that capacity, evidence showing conversations between such agent and the sheriff, to the effect that the agent agreed to keep such goods for the sheriff, after the levy thereon while in the company's possession, was admissible in an action against the corporation for the conversion of the goods, since the corporation would not be bound by the acts of the agent beyond the scope of his authority.

CARRIER — LIEN — ENFORCEMENT.

Where a carrier, having a lien upon goods for freight and wharfage, had never surrendered possession thereof to the sheriff upon an attachment against the goods, its subsequent sale of the goods to satisfy its lien would be legal.

SAME — PLEADING — VARIANCE.

Where a complaint in an action was founded on the theory that defendant, while acting as custodian of goods under a levy

Opinion Per Curiam.

[30 Wash.

by the sheriff, had converted same to its own use, plaintiff could not recover upon a contract to the effect that defendant had a lien on the goods for freight and wharfage charges and had agreed to notify plaintiff in case it became necessary for it to dispose of the goods.

SAME — DISPOSITION OF SURPLUS.

Where a carrier has sold goods for a sum in excess of its lien for freight and wharfage charges, the court may properly order the excess turned over to the county treasurer, under Bal. Code, § 5966, subject to the order of the party entitled thereto.

COSTS — ATTORNEY'S FEES — RECOVERY BY SEVERAL DEFENDANTS.

Statutory attorney fees are allowable to each of several defendants who answer separately, under Bal. Code, § 5171, which provides that "in all actions where there are several defendants not united in interest, and making separate defenses by separate answers, the court may award costs to such defendants as recover judgments in their favor."

Appeal from Superior Court, King County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Allen, Allen & Stratton, for appellant.

Piles, Donworth & Howe, C. H. Farrell and Wilshire & Kenaga, for respondents.

PER CURIAM.—The complaint alleged in substance that, in an action wherein one Lee was plaintiff and the appellant defendant, commenced on the 17th day of September, 1898, for the recovery of money, an attachment was issued on the 19th day of said month of September, and the writ was duly levied by W. H. Moyer, the then sheriff of King county, upon certain packages of machinery which is the property in controversy, and which was alleged to be of the value of \$1,200; that the said property, at the time it was so seized, was in a warehouse belonging to the respondent Pacific Coast Company, and upon such seizure the said Moyer, as sheriff aforesaid, designated the said Pacific Coast Company as his custodian of said property, and said

Dec. 1902.] Opinion Per Curiam.

Pacific Coast Company accepted the possession and custody of said property as keeper for the sheriff, and thereafter continued to hold it as such keeper; that afterwards, the respondent, A. T. Van De Vanter, having duly qualified as sheriff of King county, Moyer turned over and delivered to him, as sheriff, the writ of attachment, together with the property attached, and that ever since said time the possession and custody of the property has been held and retained by Van De Vanter as sheriff and the Pacific Coast Company as its keeper by virtue of said writ of attachment; that afterwards judgment was rendered in favor of the defendant in said action, directing that the property theretofore attached in said cause be delivered to said defendant; that demand for the possession of said property was duly made upon the defendants Van De Vanter and the Pacific Coast Company, but that they and each of them neglected and refused to deliver the same, and have converted the same to their own use. The Fidelity & Deposit Company of Maryland, respondent, is surety on the bond of sheriff Van De Vanter. The defendants answered separately, the sheriff and the bondsman practically denying the allegations of the complaint. The Pacific Coast Company, in addition, alleged that it had never been engaged in the business of taking and holding property seized under judicial process, and that no officer of said company was authorized on behalf of said company to accept property as custodian for the sheriff; and alleged affirmatively that, at the time the plaintiff claims said property was attached, said defendant had the said property in its sole possession and exclusive control on its wharf and in its warehouse in the city of Seattle, and had an existing lien upon said property for the amount which it had advanced, with its own charges, and that it afterwards proceeded in accordance with the statute to sell said property to satisfy

its lien; that the property sold in excess of the lien and the costs of sale for \$146.44, which amount it is alleged had never been called for by the plaintiff or any other person claiming to have a right thereto, and the defendant brought this amount into court and deposited it for the benefit of the party entitled thereto. A demurrer was interposed to this answer, which was overruled, and the affirmative allegations were put in issue by reply. Upon the close of the plaintiff's testimony, the court sustained defendants' challenge to the sufficiency of plaintiff's testimony, and directed a judgment for defendants, ordered the excess of \$146.44 above mentioned to be turned over to the county treasurer, and gave judgment for costs to the defendants, including \$15 attorney's fee to each defendant.

The first two assignments are that the court erred in refusing to admit evidence of the conversation and agreement between deputy sheriff Atwell, who was alleged to have made the levy, and Mr. Miller, as agent for the Pacific Coast Company, and the refusing to permit said Atwell to show what he did in the way of a levy on the property and in leaving it in custody of respondent Pacific Coast Company by arrangement with said Miller. We think the evidence was properly excluded. It was not shown that Miller was authorized by the Pacific Coast Company to constitute the company a keeper of goods attached by the sheriff. The testimony offered by the appellant shows that this company was not engaged in any such business, and, in fact, that its business was entirely foreign to this character of occupation. It is insisted by the appellant that, even if the contention be true that Miller exceeded his authority in pretending to keep the goods, there was a practical recognition of the arrangement by the company, and it could not keep goods which it had received under such an arrangement and plead the lack of authority

Dec. 1902.]

Opinion Per Curiam.

on the part of its agent. This statement of the law is doubtless correct, but there is not sufficient testimony to show that the company knew anything about its alleged appointment as keeper of these goods. Miller, who was introduced by the appellant, strenuously denies that any such authority was given him, or that he ever accepted such goods as keeper. We assume that there would have been a conflict of testimony between Miller and the witness whose testimony was objected to, on the question of whether Miller actually was appointed as keeper and accepted the trust. But there is no conflict on the question of Miller's authority, and, had he accepted the trust, the responsibility would simply have attached to Miller and not to the company, for it is too well established to need the citation of authority that a principal cannot be bound by an act of its agent beyond the scope of the agent's real or apparent authority.

The contention of the company is that it held the goods under its lien as a carrier; that they were sold under such lien; that it never was appointed keeper of such goods, and that no writ of attachment had ever issued thereon. It is asserted by the appellant, in its reply brief, that there is no evidence that the Pacific Coast Company ever had any lien; but we think counsel is mistaken in this regard. Outside of the answer of the Pacific Coast Company, which was introduced by the appellant, and which alleges the lien and the sale under the same, Judge Stratton, one of the attorneys in the case, who testified in appellant's behalf, testified, on page 23 of the statement of facts, that the Pacific Coast Company held the property for the advance charges of whatever steamship brought it, and the storage charges. He also testified that he knew of the claim of the Pacific Coast Company, and, in his conversation with one of the alleged agents of the company, assigned as a

reason for not paying it that he did not wish to make the lien more valuable in case the suit went against them. This fact is also shown by appellant's Exhibit D, which is a letter addressed to the appellant, and in the following words:

"We have on hand at Seattle a shipment of machinery from San Francisco on which the storage and freight charges now amount to \$64.40. If shipment is not disposed of in a short time I will have to sell it for our charges. Please give this your prompt attention.

Yours truly, J. F. Trowbridge, P. S. Supt."

Exhibit C is also a notification to that effect. In fact, there is an abundance of testimony that the Pacific Coast Company had a claim against these goods, and the law makes the claim a lien.

Neither do we think there was any testimony that would support a judgment to the effect that this property was ever turned over to respondent Van De Vanter, or that any legal levy was ever made. But, if such levy was made, it seems plain from the testimony that it was abandoned by sheriff Moyer. This property was received by the respondent Pacific Coast Company in July of 1898. According to appellant's contention, the property was levied upon on the 17th day of September, 1898, and the Pacific Coast Company sold the same on the 7th day of May, 1900. Thus it appears that this property was in the hands of the respondent Pacific Coast Company for nearly two years with this claim unpaid, and the appellant refusing and neglecting to pay the same lest such payment should inure to the benefit of the plaintiff in the first action. It seems to be inequitable to compel the respondent Pacific Coast Company to maintain this responsibility for so long a time without any recompense, and, after it had sold the property under its own lien claim for \$300, to demand of this com-

Dec. 1902.]Opinion Per Curiam.

pany the first original alleged value of the property. We think the sale made under the lien was a legal one.

It is argued by appellant that, in any event, an arrangement had been made by the agent of the company, Mr. Trowbridge, with one of the attorneys for the appellant, that the company should notify the attorney for the appellant in case it became necessary for it to dispose of this property. The testimony, we think, is not sufficient to establish this contract. But in any event such contract could not be recovered upon under the allegations of this complaint. The whole substance of the complaint, as far as the Pacific Coast Company is concerned, is that said company received the property as keeper from the sheriff of King county, and it had no notice that it would be called upon to defend against the contract now alleged.

What we have said is applicable to the question as to whether the court erred in overruling the motion for a new trial.

It was not error for the court to order the money turned over to the county treasurer. The law specially provides for this disposition in § 5966, Bal. Code, and it is there subject to the order of the appellant, if it belongs to it. There was no tender of the amount which would justify costs against the respondent.

Nor do we think the court erred in allowing the statutory attorney's fees to each one of the defendants. The statute provides, § 5171, Bal. Code:

"In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such defendants as recover judgments in their favor, or either of them."

Under this provision of the statute the costs were prop-

Opinion of the Court.—DUNBAR, J. [30 Wash.

erly allowed to each of the defendants who answered separately.

We think there was no error committed by the court in any particular, and the judgment is affirmed.

[No. 8982. Decided December 16, 1902.]

S. F. ALDEN, *Appellant*, v. LOUIS D. CAMPBELL, *Mayor of the City of Tacoma, Respondent.*

MUNICIPAL CORPORATIONS — SALARIES OF OFFICERS — CHARTER PROVISIONS — EVASION BY CONTRACT.

Under § 216 of the city charter of Tacoma, which provides that the city council shall fix by ordinance the salary of all other officers and employees than those fixed by charter, but "that said salaries shall never exceed the following" (designating certain officers and salaries and adding): "any other officer or agent, \$1,200 per annum," a contract between the city of Tacoma and the plaintiff, whereby the latter should overhaul, repair and revise the city's electric lighting system for a period of eight months in consideration of the sum of \$1,200, payable in monthly installments not exceeding \$150 per month, was virtually a contract of employment by the month, and hence void as being a violation of such charter provision.

Appeal from Superior Court, Pierce County.—Hon. JAMES A. WILLIAMSON, Judge. Affirmed.

Charles Bedford, for appellant.

William P. Reynolds and *Emmett N. Parker*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an action for mandamus against the mayor of the city of Tacoma, a city of the first class, to compel him to sign a warrant in favor of the appellant,

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

which warrant was alleged to have been due appellant by reason of a contract entered into with the city. Upon the application for said mandamus, respondent interposed a demurrer to the same, which demurrer was sustained by the trial court, and from the judgment thereon this appeal is taken.

Section 216 of the city charter, which specifies the elective officers of said city, fixes their salaries and provides as follows:

"The city council shall fix by ordinance the salary of all other officers and employees provided by this charter or that may be created by ordinance; provided, that said salaries shall never exceed the following:

City Attorney.....	\$2,400	per annum.
Chief of Police.....	1,200	" "
Chief of Fire Department.....	1,200	" "
Commissioner of Public Works..	1,700	" "
City Engineer.....	1,700	" "
Any other officer or agent.....	1,200	per annum."

Evidently it was thought that it was unlawful to employ an electrician for a compensation greater than \$1,200 per annum without additional legislation, and, the council desiring to employ appellant, and appellant presumably demanding a larger compensation than \$1,200 per annum, an ordinance was passed authorizing and directing the commissioner of public works to make and enter into a contract with appellant for the overhauling, repairing, and revising the lines used for carrying electric current and the lighting system of the city of Tacoma, for a period of eight months, and providing that the said contract should provide for the payment of the sum of \$1,200 to the appellant, for the performance of said work, in monthly installments not exceeding \$150. Upon the basis of this ordinance the following agreement was entered into:

"It is hereby mutually agreed between the parties hereto that the said S. F. Alden shall overhaul, repair and revise the lines used in the city of Tacoma for carrying electric current and the city's electric lighting system for a period of eight months, and in consideration of the performance of said work the city of Tacoma will pay to the said S. F. Alden the sum of \$1,200; said sum of \$1,200 shall be paid in monthly installments, not exceeding \$150 per month, beginning the first day of December, 1899."

Signed by Alden and the authorized agents of the city. The question is upon the legality of the contract.

It is contended by the appellant that he is neither an officer nor an agent of the city, but a mere temporary employee; that the charter inhibition does not apply to employees of this character, and that the council has a right to make such contract with its employees, as in its judgment is proper; that the contract in question is not a contract of employment by the month, but is similar in its nature to a contract for grading streets, constructing buildings, or overhauling buildings, etc. We are, however, unable to so construe this contract, or the charter provision in question. The provision of the charter must, of course, be construed with reference to the benefits sought to be obtained and the evils sought to be avoided by its enactment. The result sought to be attained was a protection to the tax payers of the municipality by a limitation on the powers of the city council over the salaries of the city's regular officers and employees, no matter by what names they might be designated. Under the contract this appellant might have been appropriately termed, and was in fact, a city electrician, and the manner in which he was employed cannot change the real character of the employment. He was not to be paid as a street grader is paid; when he accomplishes so much work, or as an expert is .

Dec. 1902.]

Syllabus.

paid; but he is paid \$1,200 for eight months' services, in monthly installments not exceeding \$150 per month; and, if the city and the appellant see fit to renew this contract from time to time, the result will be that the city will have permanently on its pay roll, as it now has temporarily, a city electrician receiving a salary of \$150 a month, in plain violation of the charter provision. We think the passage of the ordinance and the contract entered into thereunder were an evasion of the charter provision, and they will not be sustained.

The judgment is affirmed.

REAVIS, C. J., and ANDERS and MOUNT, JJ., concur.

[No. 4247. Decided December 16, 1902.]

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ARTHUR ATHERTON, *Appellant*, v. TACOMA RAILWAY and
POWER COMPANY *et al.*, *Respondents*.

STREET RAILWAYS — COLLISION WITH TEAM — DANGEROUS RATE OF SPEED — EVIDENCE.

In an action against an electric street car company to recover for injuries resulting from a collision with plaintiff's team, occasioned because of the operation of a car at a high rate of speed, evidence showing that the customary rate of speed of cars on the line was in excess of the limit prescribed by ordinance is irrelevant (*Christensen v. Union Trunk Line*, 6 Wash. 75, followed).

SAME — INSTRUCTIONS.

An instruction, in effect, that no recovery could be had on account of a collision with an electric car, if the speed of the car was within the limit prescribed by ordinance and if the bells were rung, is erroneous, since negligence in the rate of running the car must be determined from all the surrounding circumstances.

NEGLIGENCE — REASONABLE CARE OF PLAINTIFF — PROXIMATE CAUSE — INSTRUCTIONS.

An instruction conveying the idea that slight negligence on the plaintiff's part is sufficient to excuse negligence on the part of

Opinion of the Court.—REAVIS, C. J. [30 Wash.

the defendant is erroneous, since the jury should be directed to the question as to whose negligence is the proximate cause of the injury.

SAME — CAUSE OF ACCIDENT — QUESTION FOR JURY.

An instruction assuming as a matter of law that there was negligence in the happening of an accident is erroneous, as that is always a question of fact.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Reversed.

Govnor Teats, for appellant.

C. O. Bates and B. S. Grosscup, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Action by plaintiff (appellant) claiming damages for personal injuries against the Tacoma Railway & Power Company, a corporation organized under the laws of New Jersey, and operating an electric street railway in Tacoma, and Steffins, the motorman and servant of said railway, defendants. The claim of damages is founded on the joint negligence of the defendants in the operation of the car. The allegations of negligence are:

"That upon the evening of the 7th day of December, while the plaintiff was coming down said 21st street with a heavily loaded wagon, hauled by two horses, crossing the said railway track at the intersection of 21st and Pacific avenue, the said plaintiff was permanently maimed and injured and wounded by the negligence of the said defendant company and its agent, servant, and motorman, Clinton A. Steffins, who was in charge of the said car No. 28, struck and collided with the plaintiff and his wagon and team while the plaintiff was on his way down said 21st street and passing over and across said Pacific avenue at the intersection of said streets. . . .

"That, at the time and place where and when the plaintiff received the injuries aforesaid the defendant Steffins

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

was and for a long time theretofore had been a servant of the defendant company in charge and control of said car 23, and for a long time theretofore had been continuously motorman of said car, and said negligence of the said defendant company was done by and through its said servant then and there in its employ, and said negligence was the joint negligence of the said defendants, towit:—in running its said car from 24th street to the point of collision at an unreasonable and unlawful rate of speed towit:—at the rate of 30 miles per hour, contrary to the said ordinance of the city of Tacoma. That said unlawful and unreasonable speed was in obedience to instructions of the defendant company. That at said time of the collision, towit:—5:30 o'clock p. m. on the said 7th day of December, 1900, and at the said place along Pacific avenue, it was dark and foggy, and the street car was run and conducted without any bells ringing or any alarms given of its approach to the said crossing of the said 21st street, and in utter disregard of the rights of vehicles crossing at 21st street, and especially this plaintiff.

"That the said plaintiff, when within about 100 feet of the said crossing, looked both ways up and down Pacific avenue from said 21st street and saw the said car No. 23, which collided with plaintiff as herein charged, at or about 23d street, a distance of about 800 feet from the crossing of 21st street; and, had the said car run at a reasonable and lawful rate of speed along down said Pacific avenue towards 21st street, plaintiff would have had ample and sufficient time to have crossed the said street car track, as he had a right to do."

The city ordinance limited the rate of speed of the car, at the place where the accident occurred, to nine miles per hour. The defendants answered separately, denying negligence on their part, and setting up affirmatively contributory negligence of the plaintiff, which is stated in paragraph 1 of the affirmative defense of the railway company, as follows:

"That the collision and accident complained of by the

plaintiff occurred solely by reason of the careless and negligent conduct of the plaintiff in failing to take proper or any precautions to guard against the same, and in failing to take proper or any precautions to ascertain whether said car or any car was coming along Pacific avenue at said time and place, or whether it was safe to cross said street car track at said time and place, and without observing the situation at said time and place, and without observing the danger thereof, and, had the plaintiff used proper or any precautions in said respects, or any of them, he could have avoided said collision and said accident.

"This defendant further alleges that said collision and accident occurred solely by reason of the careless, negligent, and wilful conduct of said plaintiff in attempting to drive across and in driving across said street car track, and in full view of an approaching car, and with full notice and knowledge of the imminence of said collision and of the danger thereof."

The evidence for plaintiff tended to show that he saw the car on Pacific avenue, between 700 and 800 feet away, when he was on the cross street—21st street—about 100 feet from the car track on the avenue; that he then believed he could safely cross before the car reached the intersection of 21st street and Pacific avenue; that there were some obstructions preventing a clear view of the car, the head light of which he had seen, until he was about crossing Pacific avenue; that he was driving a heavily loaded van, which was covered, the covering extending a little forward of the driver's seat, and his attention, as he reached the avenue upon which were the tracks, was chiefly directed to the management of his horses. Several witnesses for plaintiff stated that no bell was sounded or signal given of the approaching car, and that the car was running at a high rate of speed, the street being down grade, and at a rate differently stated as from 20 to 30 miles per hour. It was at the time dark, and a fog prevailed. The

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

evidence on the part of the defendants tended to show that the bell was rung and the signals of the approaching car were duly given, and that the car was running at less than nine miles per hour, and at a moderate rate of speed. The evidence upon all the material issues was substantially conflicting. The plaintiff tendered evidence to show that the customary and habitual rate of speed of the cars of the defendant railway company on Pacific avenue was in excess of nine miles per hour, and that such cars were customarily and habitually run at a high and dangerous rate of speed. This evidence was rejected. The court instructed the jury as follows:

“1. In this case you have two questions to pass upon:—First, whether or not the defendants were negligent; second, whether or not the plaintiff was careless and negligent in his conduct, and whether, by the use of proper or any precaution, he could have avoided the accident. If you find that the defendants were negligent in the manner that the plaintiff has alleged in his complaint, and that the accident did not occur by reason of the careless and negligent conduct of the plaintiff, then you can go further and inquire into the question of damages. First you must find that the negligence, if your verdict be against the defendant, did occur through the wrongful acts of the defendants, before you can inquire into the question of damages. If you find that the plaintiff was also negligent, as alleged in the defendant’s answer, then you need go no further, and your verdict should be for the defendants.

“2. The court instructs you further that the burden is upon the plaintiff to make out and establish affirmatively by a preponderance of the evidence, the truth of all material allegations contained in his complaint, and, to enable the plaintiff to recover for the injuries of which he complains, he is bound to show affirmatively the wrongful act or omission of the defendants alleged in his complaint; he is bound to show that he sustained injuries by reason of such wrongful or negligent acts; that such injuries as

he sustained and from which he now suffers, if any, were the result of such wrongful and negligent act; and said burden of proving such acts rests upon the plaintiff throughout the trial, and never shifted to the defendants, and the burden is not, and never was at any time during the trial, upon the defendant to show that the plaintiff's injuries would have resulted notwithstanding said wrongful or negligent acts."

At the request of defendants, the court gave the following instructions:

"1. The first question for you to decide is the rate of speed of the car. The only charge of negligence against the defendant in the complaint is that the car was running at a high and negligent rate of speed, and that no bell or other alarm was rung in approaching the street. The ordinance of the city of Tacoma declares that the maximum rate of speed allowed to any car on that portion of Pacific avenue where the accident occurred is nine miles per hour. If you find that the car was not running to exceed nine miles an hour at the time the accident happened, and if you find that the gong or bell was sounded at a reasonable distance before reaching the crossing, you will find for the defendant."

"6. You are instructed that even though you should find upon the evidence herein, under the instructions given by the court, that the persons operating the street car were in fact guilty of negligence, nevertheless such negligence would be no excuse for any negligence on the part of the plaintiff. It was his duty to approach the track circumspectly; that is, to observe his surroundings, to employ the faculties by which men are endowed for their self-preservation, and not drive carelessly into a place of possible danger; and if you believe from the evidence that the plaintiff did not observe this ordinary caution your verdict should be for the defendant.

"7. It is not for you to determine in this case which party, by that I mean the plaintiff, the defendant Steffins, or the defendant the Tacoma Railway & Power Com-

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

pany, was guilty of the greater degree of negligence. Some one must have been negligent, or the accident would not have happened as it did. If you find from the evidence that the accident was caused by the concurring negligence of both the plaintiff and either of the defendants, your verdict should be for the defendant."

"10. I instruct you that the plaintiff is not to be excused from observing his surroundings by the fact that he was in a covered wagon, and that his vision was partially obscured by the cover. A man is not excused from observation by the position in which he may place himself. That is to say, a man is not allowed to blindfold his eyes, or to place an obstruction in front of his eyes, and then make an excuse for not seeing under circumstances calling for the use of his faculties of observation. Mere inconvenience in taking a position where he could see is no excuse for not seeing. It was the plaintiff's duty before entering on a place of possible danger to use ordinary care and prudence and reasonable diligence to avoid the danger. His conduct is to be measured by all of the circumstances in evidence. Ordinary care is the care that a person of ordinary prudence would use in like circumstances.

"11. If you find from the evidence that plaintiff was seated behind a cover on his wagon so that his vision from the sides of his wagon would be to some extent obscured, then I instruct you that it would devolve upon the plaintiff to use greater care and caution in approaching a place of danger than if his vision was unobscured on both sides."

The verdict upon which judgment was entered was for defendants.

1. The first error is assigned on the rejection of the evidence tendered by plaintiff to show that the customary rate of speed of the said cars on Pacific avenue was greater than the limit prescribed by the ordinance, and a high and dangerous rate. The cases cited on argument have been carefully examined, and it appears they are not in harmony upon this question. Some of those which per-

mit the reception of such testimony have expressed doubts concerning its value, and others have also declared that its admission was not reversible error. Generally, such testimony seems to be regarded as having slight relevancy to the issue, and as rather tending to divert the attention of the jury to extraneous matters. This court seems to have approved the view held by those authorities that refuse to receive such evidence. It was observed in *Christensen v. Union Trunk Line*, 6 Wash. 75 (32 Pac. 1018).

"In view of the fact that there must be a new trial of this cause, we will next consider some of the alleged errors in reference to the admission of testimony over the objections of appellant. It is contended that the court erred in permitting the plaintiff to show that this particular motor-man had run his car at a high rate of speed upon other occasions, and we think the court did err in so doing. It was a fact collateral and irrelevant to the issue, and one which the defendant could not be expected to be prepared to rebut without previous notice. 1 Greenl., Ev., § 52."

It is not deemed desirable now to disturb the ruling made in that case.

2. The errors assigned on the instructions may be considered together. From the instructions it may be generally implied that the defense of contributory negligence is somewhat emphasized. The entire case was correctly submitted to the jury upon the theory of each party, except in the first and second instructions, which contain certain words that may be subject to criticism. But some of the instructions given at the request of the defendants do not seem to be in accord with the decisions announced by this court. Instruction No. 1, given at the request of defendants, directs, if the jury find the speed of the car was within nine miles,—the limit of the ordinance,—and the bells were rung, they must find for defendants. Whether the rate at which the car is running is negligent must be

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

found in view of all the surrounding circumstances. Safety in the speed is relative, and depends on the facts in the case, and, where they are disputed, it must be submitted to the jury. *Roberts v. Spokane Street Ry. Co.*, 23 Wash. 325 (63 Pac. 506, 54 L. R. A. 184). The jury had already been correctly instructed on the effect of the ordinance as a rule of care in the operation of the cars, but the duty imposed on the defendants was reasonable care in the rate at which its car was running in view of all the facts occurring at the time of the accident. In the sixth instruction it is in substance declared that negligence on the part of the defendants would not excuse "any negligence" on the part of plaintiff. This instruction, taken in connection with the first one given by the court, where it is said the second inquiry is whether "the plaintiff was careless and negligent in conduct, and whether by the use of proper or *any precaution* he could have avoided the accident," seems to convey the idea that slight negligence will prevent a recovery by plaintiff. This is not the rule that has been announced in this state. In *Spurrier v. Front Street Cable Ry. Co.*, 3 Wash. 659 (29 Pac. 346), the refusal of the trial court to give the following portion of the instruction: "I further instruct you that, if it appears from the evidence that the plaintiff was guilty of any negligence whatever which contributed to cause the injury complained of in this action, or concurred with the negligence of the defendant, if any, in producing it, then your verdict must be for the defendant," was approved. It was observed:

"The latter part of the instruction is too broad. The person charged with contributory negligence cannot be held to any greater degree of care than the company is. But the defendant asks the court to charge the jury that the defendant cannot recover if she is guilty of 'any negligence

whatever;’ while in demand 8 he asks the court to charge the jury that the railroad company is only held to ‘exercise ordinary care and caution.’ The doctrine of contributory negligence has been carried to a considerable extent by some of the courts, but we think never quite to this extent. Due and reasonable care and caution were imposed upon both the plaintiff and the defendant by the instructions of the court, and while many courts have undertaken to elaborate these expressions, and have occupied many pages in defining them, it is doubtful if any instruction, however elaborate, could convey to the jury a better understanding of the law, and of the rights of the parties under the law, than is conveyed by the instructions of the court in this case. ‘Due and reasonable care and caution,’ said the court, ‘means that degree of care and caution which might reasonably be expected of a reasonably prudent person under the circumstances surrounding him or her at the time in question.’ This definition we think is terse, comprehensive and correct.”

In *Cowie v. Seattle*, 22 Wash. 659 (62 Pac. 121), the following instruction was held erroneous:

“You are further instructed that if you find from a preponderance of the evidence that the plaintiff, W. H. Cowie, was himself guilty of any negligence, and that such negligence was itself a cause of his injury, then you have no right to take into consideration the question whether the plaintiff W. H. Cowie or the defendant was more or less negligent in the premises; and if you find that such W. H. Cowie was so guilty of negligence which directly caused such injury, then it is your duty to find for the defendant, and it would make no difference in such case whether any defect in the sidewalk assisted in causing such injury.”

The court observed of this instruction:

“The seventh instruction which was given to the jury at respondent’s request is also erroneous, and is contrary to the doctrine announced by this court in *Spurrier v. Front Street Cable Ry. Co.*, 3 Wash. 659 (29 Pac. 346). In that case the defendant asked the court to instruct the jury that,

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

'if it appears from the evidence that the plaintiff was guilty of any negligence whatever, which contributed to cause the injury complained of in this action, or concurred with the negligence of the defendant, if any, in producing it, then your verdict must be for defendant.' And we there held that the instruction was properly refused on the ground that it imposed a greater degree of care on the plaintiff than the law required. The law does not require the plaintiff in an action for personal injuries to be absolutely free from any negligence whatever in order to recover, for such a requirement would impose upon him a duty of exercising extraordinary care and prudence, which is not the standard by which his negligence is measured. All the law requires of the plaintiff, in such cases, is the exercise of ordinary care, under the circumstances surrounding him, and this he may do, although he may be guilty of some slight negligence, in the broadest sense of that term."

In *Redford v. Spokane Street Ry. Co.*, 15 Wash. 419 (46 Pac. 650), it was said that when the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause, or a mere condition of it, the defendant is still liable. The seventh instruction seems to assume, as a matter of law, that there was negligence in the happening of the accident. This was a question appropriately for the jury. The eighth and ninth instructions seem to rather emphasize the idea that the specific omissions mentioned therein constitute negligence. The second instruction of the court first set out is rather confused, but probably was relieved by the last instruction which was given, stating correctly the burden of proof in contributory negligence.

For the errors mentioned in instructing the jury, the cause is reversed and remanded for a new trial.

DUNBAR, MOUNT and ANDERS, JJ., concur.

[No. 4292. Decided December 16, 1902.]

W. F. RICHARDSON, *Appellant*, v. EMELINE MOORE, *Respondent*.

TRIAL — REOPENING CASE FOR INTRODUCTION OF TESTIMONY — AMENDMENT OF COMPLAINT TO CORRESPOND WITH PROOF.

The reopening of a case to allow the contestant of a will to introduce in evidence another will making her a residuary legatee, although the petition contesting the will did not show upon its face any interest of the petitioner in the property of deceased, was not prejudicial to the adverse party, where the will was already on file in the case and the evidence could have been no surprise to him.

PLEADINGS — AMENDMENT ON APPEAL.

Where a party to an action was entitled to amend her pleading to correspond to the proof, the supreme court will on appeal, under the provisions of Bal. Code, § 6535, consider the amendment as made.

WILLS — TESTAMENTARY CAPACITY — SUFFICIENCY OF EVIDENCE.

A woman sixty-four years of age became insane and was taken to a hospital in the month of May, and a few days later was removed to her son's home, whence she was removed to an insane asylum about the middle of July of the same year upon a judgment of insanity rendered by the court; in June, while at her son's home, she revoked a former will in which she had disinherited him, and made a new will in his favor; there is some evidence that she had lucid intervals before making this last will; after making it she grew gradually worse and in less than four weeks was committed to the asylum. At the time of making the will she was very nervous during the day and restless at night; walked the floor and refused to remain in bed; and had delusions and hallucinations. Her physician, who attended on her at the time, and had known her for the past twelve years, testified that he did not think she was sane enough to make a will.

Held, sufficient to support the finding of the court that the testatrix was of unsound mind at the time of making the last will.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Dec. 1902.] Opinion of the Court.—MOUNT, J.

Edward Holton James, for appellant.

Charles F. Munday, for respondent.

The opinion of the court was delivered by

MOUNT, J.—On October 31, 1892, Charlotte B. Richardson, being 61 years of age, executed a will, by which she left to her son, W. F. Richardson, who was her only child, the sum of \$10, and to her sister, Emeline Moore, all the remainder of her property. About the middle of May, 1897, Mrs. Richardson became insane, and was taken to the Seattle General Hospital. After being there a few days, she was taken to the home of her son, W. F. Richardson. On June 24, 1897, while she was at the home of her son, she executed another will, by the terms of which she revoked all former wills, and left to her sister, Emeline Moore, some table ware and jewelry and all her household goods, and to her son “all the rest, residue, and remainder” of her property. On July 19, 1897, she was, by the superior court of King county, adjudged to be insane, and committed to the insane asylum at Steilacoom, where she remained until her death, from senility and exhaustion, on April 14, 1901. On April 15, 1901, the will dated June 24, 1897, was filed in the superior court of King county, and admitted to probate the same day, and her son, W. F. Richardson, named therein as executor, was appointed as executor, and qualified as such. On October 9, 1901, Emeline Moore filed her petition in said superior court praying for the probate of the will dated October 31, 1892, and at the same time filed her petition contesting the validity of the will dated June 24, 1897, and praying that the probate thereof be revoked, that the said will be declared void, on the grounds that said Charlotte B. Richardson at the time of making the said last named will was insane and

incompetent to make the same, and that the execution thereof was procured by undue influence. Issues were made up, and the case went to trial before the court without a jury, resulting in findings in favor of the contestant, and a decree that the will dated June 24, 1897, together with the probate thereof, be annulled, revoked, and letters testamentary issued thereon be set aside and canceled. From this decree this appeal is prosecuted by the executor.

Two assignments of error are made and argued in the brief of appellant, as follows: "(1) The court erred in permitting the contestant, after resting her case, and without any amendment of her petition, to introduce in evidence the will dated October 31, 1892. (2) The court erred in its sixth finding of fact, in finding that the deceased was without testamentary capacity to make the will in favor of her son."

1. The petition contesting the will did not show upon its face any interest of the petitioner in any will, or in the property of the deceased. No demurrer was filed to this petition, and no question was raised on that account, until after the close of the evidence of the contestant, when counsel for the executor moved for a nonsuit upon the ground that the contestant had shown no interest for the institution of the action. Counsel for the contestant was thereupon permitted by the court to re-open his case, and introduce in evidence the will bearing an earlier date, by which she was made the principal beneficiary. The only objection made to this evidence was that contestant had closed her case. No objection was made that the allegations in the petition were insufficient. If such an objection had been made, it was within the discretion of the trial court to have permitted an amendment thereof. *Seward v. Derrickson*, 12 Wash. 225 (40 Pac. 939); *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244 (46

Dec. 1902.] Opinion of the Court.—MOUNT, J.

Pac. 334). The evidence introduced was already on file in the case, and showed conclusively the interest of the contestant in the will. This evidence could have been no surprise to the executor, and could not have misled or prejudiced him in any way. It was not objected to on any such grounds. Under these circumstances the contestant was entitled to amend the petition to correspond with the proof, and this court on appeal will consider such amendment as made. Bal. Code, § 6535; *Allend v. Spokane & N. Ry. Co.*, 21 Wash. 324, 333 (58 Pac. 244).

2. The sixth finding of fact is as follows:

"That during the month of May, 1897, and about the middle of said month, said Charlotte B. Richardson became insane and of unsound mind, and wholly incompetent to make a will, or to devise or bequeath her estate by will; that she continued wholly insane and incompetent as aforesaid from that time, to-wit, about the middle of May, 1897, until the time of her death, on April 14, 1901; that on July 19, 1897, she was, by decree of the court duly made, admitted to the state asylum for the insane at Steilacoom in the state of Washington, and that she remained an inmate of said asylum from that time until the time of her death; that at no time after she became insane as aforesaid was she of sound mind, or competent to make a will; that on June 24, 1897, at the time when she signed the aforesaid written document bearing date that day, said Charlotte B. Richardson was insane and of unsound mind, and not competent to make a will; that said alleged will bearing date that day was without any right or authority in law, and that the same is invalid, null and void."

To determine the correctness of this finding necessitates an examination of all the evidence in the case. We have made this examination, and it clearly appears that the testatrix, at the time she was at the Seattle General Hospital in May, was insane; that she grew gradually worse until she was committed to the insane asylum at Steilacoom, and

also thereafter until her death. There is some evidence in the record that, about the latter part of May and the first part of June, before she made the last will, she had lucid intervals; that she told about the making of the first will some five years before, by which she had disinherited her son, and expressed a desire to change the will; that she wrote a note in her own hand to the attorney who had the first will, and directed him to deliver the same to her son's wife; that she thereafter, on June 24th, made the second will. After this time she grew gradually worse until she was committed to the asylum on July 19th, less than four weeks after the making of this will. She was past 64 years of age at the time she made this last will. She was very nervous during the day and restless at night; walked the floor, and refused to remain in bed; had delusions and hallucinations. Dr. Churchill, a practicing physician of thirty years' experience, who had known the testatrix personally for twelve years, and who had attended her professionally "a number of times," testified as follows:

"I did not see this change until I was called to attend her at the Seattle General Hospital. Q. When was that? A. That was the latter part of May or the first of June in 1897, I think. Q. What was her condition mentally at that time, and physical as well? A. She was in an exceedingly nervous condition, and very much depressed; and, after observing her two or three days, I concluded she was suffering from melancholia,—a form of insanity. Q. And did you see her frequently after that? A. Yes, sir. Q. And during that period for how long a time? A. I saw her frequently after that until she was committed to the insane asylum. Q. That was the 19th of the following July? A. Yes, sir. Q. Now, how did her condition change, if at all, as to her getting better or worse? A. Well, I could not see any change. She gradually grew worse until she was committed to the asylum. Q. During the time she was at the hospital, how frequently did you

Dec. 1902.] Opinion of the Court.—MOUNT, J.

see her? Each day, for how long a time? A. I don't know as I could recollect now. She was only there a short time,—a week or so, and she was not violent, and her daughter-in-law thought she could take care of her at home. Q. Did you see her while she was at the home of W. F. Richardson? A. I saw her a number of times there; yes, sir. Q. Now, at that time did she have lucid intervals, or was her condition continuous? A. Well, I don't know as I could tell. I could not see any improvement in her condition. Sometimes she was quieter than at other times. She would talk to me about her physical feelings, and at all times manifested a good deal of nervousness, unable to sit still, and seemed to be brooding and melancholy and depressed, as one is under those conditions. Q. Now, at that time, what would you say of her condition as to her ability to form a conclusion, or to reason logically, or to transact business, or dispose of her property, or execute a will, or anything of that kind? A. I do not think she was mentally capacitated for anything of that kind. Mrs. Richardson (meaning the daughter-in-law) asked me several times if I thought her mother could make a legal will, and I told her I did not think so. Q. That was during the time she was at her house? A. Yes, sir. Q. Your conclusion was from what you saw and knew of her, and what you had known of her condition? A. Yes, sir. Q. That is your conclusion now and at that time? A. I never saw any sign of improvement in her, but gradual deterioration."

And further on in his testimony he said in substance:

"She was constantly in great perturbation, and I don't think she was capable of making a sane will. I could not see any abrupt change, but simply a gradual deterioration, growing weaker in mind and body. I do not think there was any time when she grew better."

The testimony of Dr. Churchill in this case is entitled to great weight, if it is not controlling of the case. It is not discredited in any way by any witness having equal advantages and opportunities of knowing the facts. He was

an entirely disinterested person, having no relations with any of the parties hereto, and no interest in the result of the case. Schouler on Wills (3d ed.), § 119, says:

"Where one's mental condition appeared to his medical attendant suitable for the testamentary act, or the reverse, shortly before or after the will was made, testimony to this purport should carry great weight. But after all, the real point at issue upon which such testimony bears, is the mental condition, the state of surrounding circumstances, at the precise time of the testamentary act."

See, also, note 2 to this section, and §§ 196 and 204.

The weight of the evidence in this case appears to sustain the findings of the trial court, but we have often held that, if we deem the testimony upon review as evenly balanced, we should sustain the findings of the lower court, who saw and heard the witnesses.

The judgment appealed from is therefore affirmed.

REAVIS, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 4861. Decided December 16, 1902.]

C. McDANIELS *et al.*, *Appellants*, v. GEORGIANA C. GOWEY,
as Executrix, Respondent.

SUPPLEMENTAL PLEADINGS — DISCRETION OF COURT.

Allowing defendant to file a supplemental answer is a matter within the discretion of the court, and will only be disturbed upon a showing of abuse.

BONDS — LIQUIDATED DAMAGES OR PENALTY.

Where the vendor of land, upon which there was a mortgage, unpaid taxes and a five-year contract for cutting timber held by third parties, gave a bond to the vendees in a stipulated sum, conditioned that if the obligors should on or before six months from the date of the bond procure the satisfaction of the mortgage and

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

remove the other incumbrances on the land, then the obligation should be void, the bond must be construed as one not for liquidated damages, but as imposing a penalty under which the obligees were entitled to recover only the actual damages suffered by them.

Appeal from Superior Court, Pierce County.—Hon. THAD HUSTON, Judge. Affirmed.

J. H. McDaniels, for appellants.

Troy & Falknor, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal from a judgment on the pleadings dismissing the action as to respondent Georgiana S. Gowey. The action was originally brought in June, 1898, against F. F. Williamson, A. A. Phillips, and John F. Gowey, to recover on a bond executed by them. After the death of Mr. Gowey, the plaintiffs filed their second amended complaint, substituting Mrs. Gowey, who had been appointed as executrix of John F. Gowey, as party defendant for John F. Gowey, deceased. The complaint alleged, in substance, that on December 3, 1891, Williamson and wife and one Atkins and wife conveyed about 1,350 acres of land to plaintiffs, C. McDaniels and George F. Orchard, by warranty deed, for a consideration of \$20,000; that at the time of said conveyance said land was subject to a mortgage that had been theretofore executed by said J. C. Atkins to H. A. P. Carter to secure a promissory note dated April, 1890, for \$4,000, payable five years after date, executed by said Atkins and Williamson; that there were some other incumbrances on the land, to-wit, \$19.41, for unpaid taxes, and also a right in one A. D. Moore and his wife and C. H. Smith and his wife to cut timber from said premises for a period of five years from

and after December 7, 1889; that Williamson and Atkins agreed to free said land from said incumbrance; that, in consideration of the price paid for the land, Williamson, as principal, and Phillips and Gowey, as sureties, executed and delivered to McDaniels and Orchard and the Puget Sound Fruit, Land and Development Company a bond of that date, wherein they acknowledged themselves bound to the obligees in the sum of \$8,000, subject to the condition that if the obligors should, on or before six months from the date of the bond, procure said Carter mortgage to be satisfied and discharged of record, and remove the other incumbrances on the land, the obligation should become null and void, but otherwise it should remain in full force and effect (in explanation of the fact that the Fruit Land Company was made a co-obligee, the bond recited that it was the intention of McDaniels and Orchard to convey the land to the Fruit Land Company); that more than six months had elapsed since the date of the bond, and the mortgage to Carter had not been paid or discharged of record; that in April, 1898, an action had been commenced to foreclose the mortgage, which was then pending in the superior court for Mason county, and that the obligors on said bond and the defendants had failed to perform any of the conditions of the bond; that the Fruit Land Company had assigned its interest in said bond to plaintiff C. McDaniels; that plaintiffs had presented their claim upon said bond to Mrs. Gowey, as executrix; and that it had been disallowed. Demand was made for judgment. Defendant Phillips demurred to the complaint, and his demurrer was overruled. Phillips declining to plead further, and, Williamson having defaulted, separate judgments were rendered against them for the amount of the bond. Mrs. Gowey also demurred. Her demurrer was

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

overruled, and she answered. On August 1, 1901, she filed a motion for leave to file a supplemental answer. In this supplemental answer she alleged that since the filing of her amended answer she had procured the Carter mortgage to be released and discharged of record, and that she had tendered the treasurer of Mason county the amount of taxes mentioned in the condition of the bond, but that the treasurer had refused to accept the same for the reason that said taxes had been canceled. She tendered the abstract called for in the condition of the bond, together with \$20 as costs and disbursements of plaintiffs, the amount they had expended, and asked that the action be dismissed as to her, and that she be subrogated to the plaintiffs' rights in the judgments against Phillips and Williamson. Demurders and motions were made to the sufficiency of the supplemental answer, which were overruled. A reply was filed putting in issue certain questions, the discussion of which is not necessary to a determination of this action, and, upon the joining of issues, respondent moved for judgment on the pleadings, whereupon the court granted a motion for judgment, dismissing the action as to Mrs. Gowey, but refusing to subrogate her to the rights of appellants in the judgments against Williamson and Phillips.

The assignments are that the court erred (1) in granting respondent's motion to file her supplemental answer; (2) in denying appellants' motion to strike said supplemental answer; (3) in overruling appellants' demurrer to respondent's supplemental answer; (4) in granting respondent's motion for judgment on the pleadings, and rendering judgment dismissing the action as to her. The first two assignments involve the discretion of the court in relation to the establishment of the pleadings. It does not appear to us that the court abused its discretion in this regard, and therefore no error was committed.

The third and fourth assignments may be considered together. The underlying question in this case is whether the bond sued upon is an indemnifying bond, or whether the provision in such bond is for liquidated damages. If such provision is to be construed as liquidated damages, the court erred in its judgment, and the parties to the bond are responsible for the amount stated therein. But if the bond is an indemnifying bond, the plaintiffs can recover only such actual damages as they allege and prove. There is no damage alleged in the complaint; the plaintiffs standing on their legal right to recover the amount of the bond, upon the theory that the amount stated is liquidated damages. We think, under the overwhelming weight of authority, the bond in this case must be construed to be an indemnifying bond, and that its principal use and office was to insure to the purchasers of this land a clear title to the same; that it was intended to be, and was in fact, a covenant against incumbrances. Nor do we think that the authorities cited by the appellants sustain their contention. The quotation from 3 Parsons on Contracts (6th ed.), 186, in effect that if one is surety for another, who is bound to pay a third party a certain sum at a certain time, and the principal promises the surety that he will pay that sum at that time, so as to discharge the surety if he fails to pay it so that the surety becomes liable, the surety may recover from the principal on his promise before the surety pays the debt; and if the principal agrees with the surety to pay the debt at a certain time, and fails to pay it at that time, the surety may thereupon recover the whole amount of the debt without showing any actual damage,—may be conceded to be the law. But it is not involved, as we understand it, in the case at bar, for that is based upon the idea and the statement that the surety has become liable, and

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

the liability of the surety is the ground of plaintiffs' complaint. No liability of these plaintiffs, however, is shown. In fact, the supplemental answer interposed by Mrs. Gowey shows that they cannot be subject to any liability, and that the liability which was the subject of the contract has been extinguished by the satisfaction of the mortgage. It is even stated by Mr. Parsons, in the first part of the paragraph quoted, that, as a general rule, a surety for the payment of money cannot sue his principal until he pays the debt; and the universal rule is that, in case of a breach of contract by one of the contracting parties, the damages which the other ought to receive should be either such as may fairly and reasonably be considered as arising naturally or according to the usual course of things from such a breach, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. A perusal of this obligation shows that the central idea was a warranty of title, in order that the purchasers might sell the land without being restricted or hampered by the mortgage which was upon it. It is true that the condition is for an affirmative act or payment upon the non-performance of the conditions of the contract; but the following clause, it seems to us, interprets the contract, and shows what the real intention of the parties was: "And whereas, it is understood by all the parties hereto that it is the intention of said C. McDaniels and George F. Orchard to convey the said premises to the Puget Sound Fruit Land and Development Company; and whereas, the grantors in said deeds to said C. McDaniels and George F. Orchard have covenanted to convey to said George F. Orchard and said C. McDaniels the said premises free and clear from all incumbrances; and

whereas there is a mortgage," etc., "now, therefore, if the said obligors shall," etc., "then this obligation shall be void." It is a reasonable inference that this bond was demanded simply as an additional security of the covenants of warranty. In other words, the grantees obtained Gowey and Phillips, in addition to the grantors named in the deed, as an assurance that the land conveyed would be free from incumbrances. While, as we shall hereafter see, the intention of the parties will not alone determine whether the obligation is to be construed as a penalty or as liquidated damages, it has a bearing on the fact as to whether it is in fact liquidated damages or a penalty, and, before the contract could be adjudged to be one for liquidated damages, it would have to appear that such was the intention of the parties, although it might not necessarily be so determined, even if it did appear that such was the intention, when the actual fact did not exist.

The case of *Ham v. Hill*, 29 Mo. 275, was where A. and B. were partners. A., transferring his interest to B. and retiring from the firm, took from the latter a bond of which the following is a condition:

"Whereas the said B., having purchased the interest of said A. in the firm of 'A. & B.', in the carriage business in the city of B., Mo., and has agreed with the said A. to assume all partnership liabilities of said firm incurred between April 1, 1858, and July 1, 1858, and to pay the same whenever payment is demanded legally by the creditors of said firm; now, if the said B. shall observe and keep said agreement and pay said debts in manner and form above described, then this bond to be void; otherwise to remain in full force and virtue."

Held, that this was not merely a bond of indemnity to A.; that the obligation thereby created was not contingent upon A.'s being compelled to pay or his actually paying to the creditors of the firm the debts embraced within the

Dec. 1902.] Opinion of the Court.—DUNBEE, J.

bond, and that a right of action on the bond accrued to A. so soon as B. failed to pay those debts on demand of the corporations; and that the measure of damages would be the amount of debts provided for in the bond. But, while this case is decidedly against the weight of authority on an obligation of that kind, where the amount of damages could be easily ascertained in dollars and cents, it is not at all the case at bar; for there the liability of A. to pay the debts of the firm was still existing, and there was no showing that the same had been paid at the time of the breach, or any other time, and it was very much the same case as this case prior to the payment of the mortgage and the filing of the supplemental answer. But, even in that case, the rule contended for by the appellants was not announced, for the court in its conclusion said:

“Of course, if the bond has been paid in part, or otherwise satisfied, the defendant will be entitled to the benefit of such payment or satisfaction.”

Under that ruling, Mrs. Gowey having paid the obligation which was the basis for the bond, she should be entitled to the benefit of such payment or satisfaction, in the language of that court, and discharged from her liability, as was done.

Crofoot v. Moore, 4 Vt. 204, holds that a promise to pay certain notes signed by the promisee and another is broken when those notes become payable, and the statute of limitations then begins to run; that such a contract is not a contract of indemnity, but an action will lie upon it as soon as the pay day arrives without payment by the promisor. We see nothing in this case that will aid appellants' contention. There was no contention there that the notes had been paid at any time.

In *Wicker v. Hoppock*, 6 Wall. 94, it was held that an agreement that one should procure judgment against his

debtor, levy upon and sell his property, and that the other party to the agreement should bid the amount of the judgment for the property, was valid; and that where such other party did not attend the sale, and such property brought merely a nominal sum, the measure of damages was the amount of the judgment, with interest and the costs. This, we think, was a proper holding, for it would have been impossible, under the circumstances, as shown by the statement of facts in this case, for the jury to have determined the proper measure of damages, and in such case the parties had a right to contract with reference to what the measure of damages should be in case of a breach. But the court, in justification of its judgment in that case, says, in conclusion:

“The amount recovered only puts the other party where he would have been if Wicker had fulfilled, instead of violating the agreement.”

In the case at bar the appellants are exactly in the same position now that they would have been in if this mortgage had been released within the time prescribed in the bond. They do not allege any damage by reason of the fact that there was a clouded title, and that they were unable to receive the full value of the land by reason of such cloud. In fact, it appears that they sold the land before the time for the release of the mortgage had arrived, and any damage which they could possibly have been subjected to had been incurred before the breach.

Such, in effect, are the cases relied upon by the appellants. They complain that it may be, for all that appears from the answers, that the mortgage was satisfied for less than its face value; that there is nothing to show what, if anything, respondent paid, or how much was due on it at the time of the payment. This is a question that is of no

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

interest to, or concern of, the appellants. The mortgage, according to the answer, has been satisfied, and the appellants' responsibility in that regard has terminated by the satisfaction. While it is sometimes difficult to determine from the language of a contract whether the amount stated in the obligation should be construed to be liquidated damages or a penalty, there are some general rules which are universally accepted by the courts as a guide to interpretation. In the first place, as the doctrine of compensation is a justly favored doctrine with the courts, and is founded on a maxim of general jurisprudence, recognized as fundamental in the law of every enlightened people, viz., the doctrine of fair dealing, a contract will not be construed to be a contract for liquidated damages unless it plainly appears that the idea of liquidated damages has not only been substituted for a penalty by the parties to the contract, but rightfully substituted. The contract may be construed to be one for liquidated damages when, from the nature of the business which is the subject of the contract, the damages will be difficult to ascertain or impossible to be estimated by reference to any pecuniary standard, and where the parties to the contract, by reason of the peculiar conditions surrounding them and their more intimate acquaintance with such conditions, are better able to determine the actual damages which will be suffered by the breach. In such cases the parties are allowed to determine in advance what the damages will be, and incorporate them in the contract. But the essential idea must always be the actual damages, and, when it appears that such is not the case the claimant will be relegated to his proof of damages.

"If any doubt exist as to the right of a holder of a covenant for seisin or of right to convey to recover the consideration money or a part of it when he has neither lost

the land nor incurred expense in purchasing the paramount title, there is none with respect to the covenant against incumbrances, which, while being considered equally with them to be broken as soon as made, is yet, as respects the measure of damages, treated purely as a covenant of indemnity, and it is well settled that if the incumbrance has inflicted no actual injury upon the plaintiff, and he has paid nothing towards removing or extinguishing it, he can obtain but nominal damages, as it is considered that he shall be not allowed to recover a certain compensation for running the risk of an uncertain injury." Rawle, *Covenants for Title* (5th ed.), § 188—citing *Delavergne v. Norris*, 7 Johns. 358 (5 Am. Dec. 281), where it was held that where the plaintiff, when he sues on a covenant against incumbrances, has extinguished the incumbrance, he is entitled to recover the price he has paid for it. But if he has not extinguished it, but it is still an outstanding incumbrance, his damages would be nominal, "for he ought not to recover the value of an incumbrance," said the court, "on a contingency where he may never be disturbed by it." "This," says the author, "is the reasonable rule." When the true state of facts is considered in this case, the language of Mr. Rawle is particularly pertinent, for the true state of facts here is that the incumbrance has been removed, and it does not appear that the appellants have paid anything towards extinguishing it; and it does affirmatively appear—which carries the case even beyond the text—that it has been extinguished by the respondent.

To the same effect, *Coburn v. Litchfield*, 132 Mass. 449.

In *Eaton v. Lyman*, 30 Wis. 41, the same doctrine was announced. The case of *Briggs v. Morse*, 42 Conn. 258, while it was an action under a covenant against incumbrances, which it was claimed had been broken by the existence of a lien on the land for taxes due from defendant,

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

the language of the court is applicable to the case at bar. It said:

"The plaintiff has paid no part of the tax in question; he has paid nothing toward the extinguishment of the incumbrance, the existence of which he complains of as a breach of the defendant's covenant. His damages therefore in this action must be nominal merely."

In *Willets v. Burgess*, 34 Ill. 494, it was held that, on a breach of covenant against incumbrances, the grantee can recover only such damages as he has actually sustained. If by it title has failed and the premises have been lost, he may recover the full extent of the covenant, or, if he has removed the incumbrance, he may recover the sum paid for that purpose.

In *Taylor v. Sandiford*, 7 Wheat. 13, it was held that in general a sum of money in gross to be paid for the non-performance of an agreement is considered as a penalty, and not as liquidated damages; that where in a building contract the following covenant was contained, "The said houses to be completely finished on or before the 24th of December next, under a penalty of \$1,000, in case of failure," this was not intended as liquidated damages for the breach of that single covenant only, but applied to all the covenants made by the same party in that agreement; that it was in the nature of a penalty, and could not be set off in an action brought by the party to recover the price of the work. It will be noticed that in the case at bar the penalty attaches as much to the payment of the pittance of taxes and in satisfaction of the parties' right to cut timber on the land as it does to the releasing and satisfaction of the mortgage; and, were appellants' contention true, if the mortgage had been released and there was nothing left but the payment of a few dollars taxes, they would still be

entitled to recover their \$8,000, the sum denominated in the bond.

Mr. Clark, in his work on Contracts (p. 598), says:

"In determining whether the sum named is a penalty or liquidated damages, these rules may be stated: (a) The courts will not be guided by the name given to it by the parties. (b) If the matter of the contract is of certain value, a sum in excess of that value is a penalty. (c) If the matter is of uncertain value, the sum fixed is liquidated damages. (d) If a debt is to be paid by installments, it is no penalty to make the whole debt due on non-payment of an installment. (e) If some terms of the contract are of certain value, and some are not, and the penalty is applied to a breach of any one of them, it is not recoverable as liquidated damages."

It would be impossible, under subdivision "e," to say nothing of the other rules, to construe the bond in question to be a contract for liquidated damages.

"In case of an agreement to do or refrain from doing any particular act, secured by a penalty, the amount of the penalty is in no sense the measure of compensation, and the plaintiff must show the particular injury of which he complains and have his damages assessed by the jury. It may therefore be laid down as a settled rule that no other sum can be recovered under a penalty than that which shall compensate the plaintiff for his actual loss." Sedgwick, *Measure of Damages*, 206.

This court in *Everett Land Co. v. Maney*, 16 Wash. 552 (48 Pac. 243), and in *Krutz v. Robbins*, 12 Wash. 7 (40 Pac. 415, 28 L. R. A. 676, 50 Am. St. Rep. 871), while holding the cases there under consideration to constitute contracts for liquidated damages, laid down the rules which would prevent such a holding in the case at bar; and it is said in the former case that where the damages resulting from the breach of a contract are indefinite, uncertain, and difficult to prove, the amount stipulated in

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

the contract as damages in case of a breach should be considered as liquidated damages and not as a penalty; "thus," said the court, after quoting Pomeroy on Equity Jurisprudence, § 441, "carrying out the idea that, to constitute a stipulated sum a penalty, the damages must be easily ascertained by a jury, and that if, under the circumstances of the case, the damages cannot be ascertained with any degree of certainty or safety, the stipulated sum must be considered liquidated damages. It seems to us that this case falls squarely within the second rule announced, that there is no adequate means of ascertaining the precise damage which may result from a violation, and that the parties therefore may, if they please, contract to fix upon the amount of compensation payable by a defaulting party in case of a breach." But in this case, even presuming the mortgage had not been satisfied, there would be no difficulty whatever in determining the amount which was due on account of the breach. It would be simply a mathematical computation.

In *Jaquith v. Hudson*, 5 Mich. 123, in discussing this question, it was said by the court:

"And while there are some isolated cases (and they are but few), which seem to rest upon no very intelligible principle, it will be found, we think, that the following general principles may be confidently said to result from, and to reconcile, the great majority of the cases, both in England and in this country:

"First. The law, following the dictates of equity and natural justice, in cases of this kind, adopts the *principle of just compensation for the loss or injury actually sustained*; considering it no greater violation of this principle to confine the injured party to the recovery of *less*, than to enable him, by the aid of the court to extort *more*. It is the application, in a court of law, of that principle long recognized in courts of equity, which, disregarding the

penalty of the bond, gives *only* the damages *actually sustained*. This principle may be stated, in other words, to be, that courts of justice will not recognize or enforce a contract, or any stipulation of a contract, clearly unjust and unconscionable; a principle of common sense and common honesty so obviously in accordance with the dictates of justice and sound policy, as to make it rather matter of surprise that courts of law had not always, and in all cases, adopted it to the same extent as courts of equity. And, happily for the purposes of justice, the tendency of courts of law seems now to be towards the full recognition of the principle, in all cases."

The court then proceeds to discuss the question of the right of the parties to make contracts for liquidated damages, and concludes that such right exists only when the contract provides for liquidated damages in fact. Said the court:

"Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked, whether, in such a case, if it were *admitted* that the partiee actually *intended* the sum to be considered as *stipulated damages*, and not as a penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long exploded doctrine which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the *names* of things, and enforcing, *under the name of stipulated damages*, what in its *own nature* is but a *penalty*."

This is an exhaustive case, setting forth in clear and vigorous language, and, it seems to us, faultless logic, the principles underlying this proposition.

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

But there seems to be no great disparity of opinion among courts or textwriters on this proposition.

"Another most important class of changes in the law consists in the adoption, to a considerable extent, of the equitable doctrines concerning penalties and forfeitures. The ancient common law rigidly exacted all penalties and enforced all forfeitures if the act which should prevent them was not done at the very time and in the precise manner stipulated. Equity from the earliest period of its growth adopted the policy of relieving against penalties and forfeitures, by generally treating the time of performance as immaterial, and a substantial conformity to the stipulated manner of it as sufficient, and by giving to the creditor what was justly and equitably his due, and compelling him to forego the surplus which he had exacted, and which the law permitted him to retain. These equitable doctrines have to a great extent been transferred into the law of the American states. Law courts give judgment for the amount really due, and not for the penalty, and often accept a subsequent performance without exacting the forfeiture. The most familiar example is that of a bond with penalty, conditioned for the payment of a smaller sum which represents the real debt. The equitable doctrine restricting the recovery to the sum constituting the actual debt, with interest for the delay, has been everywhere accepted as a settled rule of the law. This modification of the common law has generally been extended so as to include all cases where a penalty or forfeiture has been agreed upon as security for the payment of a certain or ascertainable sum of money." 1 Pomeroy, *Equity Jurisprudence*, § 72.

In discussing the same question, in § 381, the author says:

"The general doctrine was finally settled that, wherever a penalty or forfeiture is inserted merely to secure the payment of money, or the performance of some act, or the enjoyment of some right or benefit, equity regards such payment, performance, or enjoyment as the real and principal

intent of the instrument, and the penalty or forfeiture as merely an accessory, and will therefore relieve the debtor party from such penalty or forfeiture, whenever the actual damages sustained by the creditor party can be adequately compensated. . . . If the principal contract is merely for the payment of money, there can be no difficulty; the debtor party will always be relieved from the penalty or forfeiture upon paying the amount due and interest. If the principal contract is for the performance of some other act or undertaking, and its non-performance can be pecuniarily compensated, the amount of such damages will be ascertained, and the debtor will be relieved upon their payment."

Again, in § 433, it is said:

"The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured. . . . It is a familiar doctrine, therefore, that if the penalty is inserted to secure the payment of a pecuniary obligation, relief against it will be granted to the debtor upon his payment of the real amount due and secured, together with interest and costs, if any have accrued."

And what is said in § 434 of the form of relief is applicable to this discussion:

"Under the modern legislation, and especially under the reformed procedure, the rights of the debtor party would be protected, and the relief obtained, without any separate suit in equity, but by an equitable defense set up in the action at law by which the creditor sought to enforce the literal terms of the agreement. [That is exactly the procedure here.] . . . The equitable doctrine, as above described, has to a considerable extent been incorporated into the law, partly as the result of statute, and partly from the gradual development of equitable principles in the common law. Whatever be the true explanation, the rule is now very general, even if not universal, that a recovery in actions at law upon contracts which

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

contain an express stipulation for a penalty is limited to the actual debt due, or the actual damages sustained."

Again, in § 440:

"If upon the whole agreement the court can see that the sum stipulated to be paid was intended as a penalty, the designation of it by the parties as 'liquidated damages' will not prevent this construction; if, on the other hand, the intent is plain that the sum shall be 'liquidated damages,' it will not be treated as a penalty because the parties have called it by that name. It is well settled, however, that if the intent is at all doubtful, the tendency of the courts is in favor of the interpretation which makes the sum a penalty."

Much more is said by the same author which is pertinent here in this case, but which it is not practicable to insert.

In conclusion, we think the authority is overwhelming to the effect that the bond in this case must be construed as a contract for indemnity; that the object sought by the bond was to insure a clear title to the land; that that object has been accomplished by the satisfaction of the mortgage, the payment of the taxes, and the expiration of the time in which the timber was to be cut; that no damages have been alleged by the appellants; and that none could be suffered under the pleadings; and the judgment of the court was right and will be affirmed.

REAVIS, C. J., and MOUNT and ANDERS, JJ., concur.

[No. 4362. Decided December 16, 1902.]

WILLIAM ROBERTS, *Appellant*, v. WHITE RIVER WATER
POWER COMPANY *et al.*, *Respondents*.

**SALE OF LAND FOR RIGHT OF WAY — CONSTRUCTION OF CONTRACT —
SPECIFIC PERFORMANCE.**

An agreement by plaintiff in consideration of the sum of \$200, the receipt of \$160 of which is acknowledged, to convey defendant a right of way across his lands according to a certain line of survey; that defendant should have the right to enter upon the lands for the purpose of constructing a ditch along the proposed right of way, across which defendant agreed to construct a bridge at a point to be designated by plaintiff; and that, in consideration of the premises, the plaintiff agreed to execute a good and sufficient conveyance, on or before one year from date, upon the payment of the balance of \$40 in cash, is not an option, but a mutual contract of sale of land, enforceable by defendant after the lapse of the year, inasmuch as time is not made of the essence of the contract, and for the reason that delay in payment of an inconsequential portion of the purchase price would not be sufficient of itself to justify forfeiture.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Affirmed.

A. R. Tallow, for appellant.

J. M. Ashton and *W. L. Sachse*, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Plaintiff (appellant) commenced this action to enjoin defendants from entering upon certain real estate owned by plaintiff, and digging up the soil and destroying growing timber and improvements thereon. He stated that defendants' intention was to conduct a ditch or conduit for water over the premises. Plaintiff claimed damages for the injuries done, and prayed that defendants be enjoined from entering upon or further trespassing on

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

the premises. It was alleged the defendants' entry was without right and wrongful. Defendants answered denying any damages to plaintiff, and setting forth affirmatively as a defense a claim in themselves to a right of way 100 feet in width through said premises for the construction of a ditch or conduit and other purposes, based upon a written agreement set forth in the answer. The case was tried without the intervention of a jury, and findings of fact and conclusions of law made by the court. The facts found were, in substance, that a written instrument was executed and signed by plaintiff on the 8th of May, 1900, containing the following stipulations, which are material here:

"This Indenture, made and entered into this eighth day of May, 1900, by and between William Roberts, a bachelor, party of the first part, and the White River Water Power Company, a corporation, party of the second part:

"Witnesseth: That the said party of the first part, for and in consideration of the sum of two hundred dollars, one hundred and sixty dollars of which has been paid to him, the receipt of which is hereby acknowledged, the balance of forty dollars to be paid to him as hereinafter set forth, does hereby undertake, promise, and agree that he will hereafter, on the demand of the party of the second part, its successors or assigns, convey, by good and sufficient deed, to the said party of the second part, its successors or assigns, a right of way for a canal, ditch, conduit, pipe, or electrical pole line, also the water, and right to use the same, which flows and may flow in that certain swamp, being hereafter referred to and more definitely located, said right of way to be one hundred (100) feet wide, over and across certain real estate hereinafter more particularly described."

Then follows a description of a right of way made by a surveyor named Hawkes, and mentioned as the "Hawkes

Survey." It was also agreed that the second party in the agreement should have the right in the meantime to enter upon the premises to construct its ditch or conduit across the same; and further stipulated that, within a reasonable time after the construction of the ditch, the second party should construct a bridge across the ditch at a point to be designated by the first party. Then follows a re-statement of the agreement to convey and the consideration in this form:

"The party of the first part, in consideration of the premises, agrees that he will, on or before one year from the date hereof, convey to the party of the second part, its successors and assigns, a right of way of the character and description hereinbefore set forth, across the lands hereinbefore described, according to the survey made by the said A. McLean Hawkes, hereinbefore referred to, or according to a survey to be made by the party of the second part prior to the expiration of said year, as the said party of the second part may require and elect, upon the payment to him, the said party of the first part, of the sum of forty dollars in cash, the balance of the payment hereinbefore referred to, and upon the payment of the said sum the said party of the first part agrees to deliver to the said party of the second part, its successors and assigns, a good and sufficient deed conveying the said right of way according to the terms, conditions and provisions hereof."

At the trial the defendants tendered the \$40, the balance of the purchase price under the agreement, and prayed that a specific performance thereof be decreed in their favor, and that plaintiff convey the right of way to defendants. The court found that the defendants, in August or September, 1901, entered upon the premises, and slashed timber and threatened to injure materially plaintiff's improvements, and that such entry was not confined to the "Hawkes line of survey," but a portion of such slashing, made under said entry, and the improvements

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

threatened, were outside the Hawkes survey. For this entry upon the premises outside said survey, the court awarded plaintiff damages, and enjoined defendants from going outside the line of the Hawkes survey, referred to in the written agreement. The court further found, upon the allegations of the answer, that the agreement between plaintiff and defendants was a binding contract for the conveyance of the right of way to defendants on the line of the Hawkes survey described in said agreement, and decreed that, upon payment of the damages awarded plaintiff for injuries to the premises outside the line of the Hawkes survey, and upon the payment of the \$40, remainder due to plaintiff on the purchase price, he should convey the described right of way to the defendants.

The only material controversy arising upon the record is over the proper construction of the written agreement set out in the answer. Counsel for plaintiff maintains that, as defendants did nothing towards performance for over a year after its execution, they could not afterwards, when this suit was instituted and in this action, enforce the specific performance on the part of the plaintiff of the contract to execute and deliver the deed to the right of way. It is argued that the agreement is an option or unilateral contract, and that no mutuality of obligation is expressed or inferred from its terms. The construction of this agreement must be gathered by taking together the surrounding facts and recitations of the consideration. The first recitation is that, in consideration of \$200, the first party promised to execute the deed, on demand of the second party and the payment of the \$40 still due, that is, on complete payment of the purchase price. Then follows the description of the right of way according to the Hawkes survey, or any modification thereof agreed to by both parties, and the stipulation that a bridge should be constructed

in a reasonable time after the completion of the ditch. Then is the repetition and promise, "in consideration of the premises," etc. This apparently means the promise of the second party to follow the Hawkes line of survey unless modified by agreement, and to erect the bridge when the ditch is completed, and that, upon such promises and the payment of the deferred portion of the purchase price,—\$40,—the first party will execute and deliver the deed. The language used does not so clearly express the meaning, perhaps, as it might have done; but, viewed in the light of the surrounding circumstances and from the standpoint of each party, it may reasonably be gathered in sense that the first party was to execute the deed at any time after the written agreement was executed, upon demand of the second party and tender payment of the \$40; and the last clause, reciting the terms and consideration, declares the first party will convey on or before one year upon receipt of the \$40. It seems apparent that here is a mutual agreement by one party to sell and the other to purchase the right of way. The second party paid, upon the execution and delivery of the written agreement, the substantial portion of the purchase price. It may be conceded, as contended by counsel for appellant, that it was contemplated by both parties that the deed should be executed within the year, but time cannot be said to be of the essence of the contract. If plaintiff desired to have the contract annulled, he could, at the expiration of the year, have tendered his deed and demanded the payment of the \$40, or he could have claimed rescission thereof upon any further default of defendants. But it does not appear from the record before us that plaintiff has been in any manner injured by the delay of defendants. The delay in the payment of an inconsequential portion of the purchase price is not sufficient to inflict the penalty of for-

Dec. 1902.]

Syllabus.

feiture upon the defendants, where, as observed, time is not of the essence of the contract. The whole consideration which the plaintiff was to receive for the right of way was \$200. The stipulation that, subsequent to the construction of the ditch, the bridge should be constructed at a place designated by plaintiff, is a covenant which defendants must perform subsequently to their use of the right of way. The fact that defendants trespassed upon other portions of plaintiff's premises wrongfully does not become material here in the determination of the rights of the respective parties under their contract; but this was appropriately settled by the award of damages to plaintiff in this action.

Under well recognized equitable principles, no valid reasons are perceived for disturbing the conclusions and the decree of the superior court. Affirmed.

DUNBAR, MOUNT and ANDERS, JJ., concur.

[No. 4880. Decided December 16, 1902.]

JAMES RANDALL, *Respondent*, v. CITY OF HOQUIAM, *Appellant*.

NEGLIGENCE — PLEADING — NEGATIVING CONTRIBUTORY NEGLIGENCE.

The complaint in an action for negligence is not demurrable for failure to negative contributory negligence on the part of plaintiff, as that is always matter of defense.

MUNICIPAL CORPORATIONS — DEFECTIVE STREET — NOTICE TO CITY — ALLEGATIONS OF COMPLAINT.

In an action against a city for injuries received on account of a defective street, the complaint sufficiently alleges notice to the city of the defect, when it charges that the condition of the street had existed for considerable time and was well known to the city.

SAME — ADMISSION OF EVIDENCE — HARMLESS ERROR.

In such an action, it was not prejudicial error to permit plaintiff to be asked if he made any search for lights after the injury, to which his answer was that he did not.

SAME — EVIDENCE — CONDITION OF STREET PRIOR TO ACCIDENT.

Evidence is admissible of the defective condition of a street where an accident occurred, both at the time of the accident and prior thereto, since such evidence raises an implication of notice to the city.

SAME.

For the same reason, questions to the street commissioner as to the condition of the street are pertinent.

Appeal from Superior Court, Chehalis County.—Hon. MASON IRWIN, Judge. Affirmed.

F. L. Morgan (*Sidney Moor Heath*, of counsel), for appellant.

W. H. Abel, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Action for personal injuries. The material allegations of the complaint are:

“That at all the times herein mentioned 8th street has been, and still is, one of the public streets and thoroughfares situate within the said city of Hoquiam, and generally used by the public as such street, and at all said times it was and is the duty of the said defendant to keep said 8th street in good repair and in a reasonably safe condition for travel.

“That on or about November 5, 1901, that part of 8th street commencing at the railroad track near the public bridge crossing the Hoquiam River, and extending westerly for a distance of one block, was in an unsafe, defective, and dangerous condition, in this, to-wit: that at said time the northerly side of said street immediately edging the sidewalk extending along the north side of said street had the planking of said street removed, and a large ditch or

Dec. 1902.] Opinion of the Court.—RAVIS, C. J.

excavation, several feet in depth, extended along the north side of said street, adjoining said sidewalk; that said condition had existed for a considerable period of time prior to said date, and said condition was well known to the defendant, its officers and agents; that said ditch or excavation at said time and prior thereto had been by the said city left exposed, unfenced, and unlighted, so that at night any person desiring to cross the said 8th street was necessarily in great danger of falling into said excavation or ditch and receiving injuries thereby.

"That on or about the said 5th day of November, 1901, in the night time of said day, the plaintiff desiring to cross said 8th street, from the north side thereof in said block, and being wholly unaware of the unsafe, defective, and dangerous condition thereof, and having no knowledge nor notice thereof, nor of said excavation or ditch, and said excavation or ditch being then and there unfenced and unprotected in any way, and there being then and there no light nor any warning whatsoever whereby to warn the public of the existence of said excavation or ditch, and plaintiff being wholly unaware of danger, without fault or negligence on his part, in crossing said street about the middle of said block, was precipitated into said hole, and stumbled and fell therein, so that he then and there received serious bodily injuries."

Upon trial a verdict was returned in favor of plaintiff for \$683.33 1-3 damages.

The first error assigned is overruling the general demurrer to the complaint. The objection urged on argument to the complaint is that it did not allege due caution while crossing the street, and it is claimed that such allegation is necessary where a crossing is made otherwise than at the intersection of the street or at regular crossings. In answer to this it may be observed that contributory negligence, as well as the assumption of risk on the part of plaintiff, need not be negatived in the complaint, as they are matters of defense, under frequent de-

cisions of this court. But it seems that the complaint, in paragraph 4, does allege that plaintiff was "without fault or negligence on his part."

Another objection is that there is no allegation "of notice or excuse for notice to the city, or any facts showing notice to the city." Paragraph 3 charges that the condition in the street had existed for considerable time, and that it was well known to the city. See *Noll v. Seattle*, 29 Wash. 28 (69 Pac. 382); *Beall v. Seattle*, 28 Wash. 593 (69 Pac. 12).

Some objections were made to testimony on the part of plaintiff. He was asked if after the injury he made any search for lights, and answered he did not. No prejudice is perceptible here. Another of plaintiff's witnesses was asked the condition of the street on the block where the accident occurred, at the date thereof and prior thereto. The answer was sufficiently confined to the time. A defective condition of the street, shown under these conditions, would be some implication of notice to the city. *Laurie v. Ballard*, 25 Wash. 127 (64 Pac. 906).

The questions to the street commissioner were pertinent for the same reason. *Saylor v. Montesano*, 11 Wash. 328 (39 Pac. 653).

Referring to the motion by defendant for nonsuit and for an instructed verdict in favor of defendant, it may be observed the evidence is fairly conflicting, and the case was properly submitted to the jury.

Judgment affirmed.

DUNBAR, MOUNT and ANDERS, JJ., concur.

Dec. 1902.]

Syllabus.

[No. 4402. Decided December 16, 1902.]

THE STATE OF WASHINGTON, Respondent, v. CHARLOTTE CLARK, Trustee, Appellant.

30	439
35	345
335	582
20	439
439	180

CONSTITUTIONAL LAW — LEGISLATIVE POWERS — INHERITANCE TAX.

The absence in the constitution of specially delegated power to the legislature of this state to enact laws for the taxation of inheritances is not to be construed as a restriction of the right, under the provisions of the Bill of Rights, which declare in art. 1, § 1, that "all political power is inherent in the people, and governments derive their just powers from the consent of the governed," and in art. 1, § 30, that "the enumeration in this constitution of certain rights shall not be construed to deny others retained by the people," since legacies and inheritances are but creatures of the law, and natural subjects for legislative control, in the absence of constitutional prohibition.

SAME.

Laws 1901, p. 67, providing for the taxation of inheritances is not invalid by reason of exempting some and laying proportional taxes on different ones, since the charges provided for are upon the passing of the estate by succession and are not a tax upon property, and hence do not conflict with art. 7, §§ 1, 2, 5, of the state constitution, which require all property to be taxed uniformly according to its value in money.

SAME — EQUALITY OF TAXATION.

The exemption in the inheritance tax law (Laws 1901, p. 68, § 2) from the provisions of the act of sums below \$10,000 when the estate passes to direct heirs and kindred is not invalid as violating the constitutional requirement of equality in taxation, for the reason that it does not extend the same exemption to devises to collateral heirs or strangers to the blood, since there is no inequality provided among members of the same class, and such rule of equality does not forbid a liberal classification for purposes of taxation.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Affirmed.

Opinion of the Court.—REAVIS, C. J. [30 Wash.

Sullivan, Nuzum & Nuzum, for appellant.

W. B. Stratton, Attorney General, and *E. W. Ross* and *C. C. Dalton*, for the State.

The opinion of the court was delivered by

REAVIS, C. J.—James Clark died testate in Spokane county August 8, 1901, owning and possessed of property, real and personal, within the state, of the value of \$140,-751.40. By his will Charlotte Clark, appellant, was appointed executrix and trustee for the purpose of administering the estate under the provisions of the law. Controversies arose between appellant and the state over the demand by the state for the tax claimed under the provisions of the act relating to the taxation of inheritances. Laws 1901, p. 67. The facts are stated by agreement. Those material for consideration here are, in substance: That all debts owing by deceased at the time of his death for local and state taxes due, and the reasonable sum for funeral expenses, costs of appraisement for assessing the inheritance tax, and costs of administration, amount to \$12,333.50; that after deduction of said sum of \$12,333.50 from the estate, the entire residue thereof is devised as follows: To N. Fred Essig, a stranger to the blood of said deceased, \$1,500; to E. Kauten, a stranger to the blood of said deceased, \$1,000; to Mamie McCoy, a niece of said deceased, \$5,000; to Agnes Clark, a stranger to the blood of said deceased, \$10,000; to Mrs. Mary Harvey, a sister of said deceased, \$2,500; to Mrs. Bessie Casey, a sister of said deceased, \$2,500; to Catherine M. Clark, a daughter of said deceased, \$52,633.95; to Patrick P. Clark, a son of said deceased, \$53,383.95;—total \$128,517.90. Upon these facts the court concluded that the \$10,000 exemption mentioned in § 2 of the statute is a single exemption confined to and in favor of the class of

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

heirs composed of father, mother, husband, wife, lineal descendants, adopted child, or the lineal descendants of an adopted child, and must be taken from their portion of the estate; namely, Catherine Clark, the daughter, and Patrick P. Clark, the son of deceased; and further concluded that such exemption did not extend to the shares of any of the other legatees mentioned; that there was no authorized exemption of the estate passing to collateral heirs or strangers to the blood; that the tax imposed in the statute is laid upon the succession or devolution of the estate and upon the right of passing the estate, and is not a tax upon the estate.

1. The first objection urged to the decree is that the statute under which it is made is invalid, because the legislature was without power to lay such an imposition or tax upon the devolution of an estate. It does not appear from the argument of counsel that they assume the objection to the power of the legislature is sustained by any considerable authority, but an earnest appeal is made to general principles of constitutional construction. It is urged that our state constitution grants to the legislature special and delegated powers, and legislative enactments, to be valid, must come within such grant of powers; but no sanction is found for such principle of interpretation in the numerous authorities referred to in counsel's brief. The two principal cases relied upon by counsel as adverse to the validity of such laws are *Black v. State*, 113 Wis. 205 (89 N. W. 522), and *Curry v. Spencer*, 61 N. H. 624 (60 Am. Rep. 337). In each of these decisions inheritance tax statutes were determined invalid upon construction of provisions existing in the respective state constitutions. In the Wisconsin case the court concluded that a provision in the statute before it exempting estates below \$10,000 in value, and without regard to the value of the bequests, and

taxing those above the value of \$10,000, conferred special privileges on the exempted class, and was forbidden by a constitutional provision against conferring special privileges. It is true the opinion questions the complete control of the state over the devolution of property after the death of the owner. Though conceding that the current of judicial expression is in favor of such power, the concurring opinion in the decision of one of the justices also maintains that the general constitutional declaration of the right to life, liberty and the pursuit of happiness protects the right to inherit or devise property, because such rights are natural ones. But he also concedes that the weight of the highest authority defines such rights as arising from municipal law. In the New Hampshire case an inheritance tax was adjudged void because of a constitutional restriction found to exist in the grant of the taxing power to the legislature. The court observes:

"Nor is it to be questioned that the subject of the taxation in the present case is one within legislative control, because inheritances, distributive shares, and legacies are but creatures of the law; in fact, the only right to take or dispose of property by descent or devise is derived from the sovereign power of the state through its laws. 'Wills, therefore, and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them.' 2 Blk. Com. 12. It must be conceded, then, that in the absence of constitutional prohibition, the legislature has the power to impose conditions by way of a tax upon legacies and successions; and so the only inquiry is, whether the taxation in question is excluded either by the express terms of the constitution, or by necessary implication, because if it is not, the power of the legislature must be regarded as having been properly exercised. An answer to the inquiry is readily afforded; for while by art. 5 of our constitution the legislature is empowered to assess and

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

levy taxes, this grant of power is expressly limited to ‘proportional and reasonable assessments, rates, and taxes upon all the inhabitants and residents within the said state, and upon the estates within the same,’ and by the Bill of Rights (Art. 12) every inhabitant is bound to contribute only his share, which manifestly, and according to the uniform decisions of this court for more than half a century, cannot be more than his proportional share of the common burden.”

Thus these cases in which such taxes were adjudged invalid concede the power of the legislature to enact such statutes unless some express or implied restriction is found in the constitution. The only intimation made in any of the authorities before us of a doubt of the plenary power of the legislature to enact such laws where unrestrained by constitutional provisions seems to have been expressed, though it was not determined, in the Wisconsin case. Counsel refer to two sections of our constitution, which, they contend, by implication support their view that the constitution is to be construed as a delegation of powers to the legislature,—the first, § 30, art. 1, which reads, “The enumeration in this constitution of certain rights shall not be construed to deny others retained by the people;” and § 1, art. 1: “Political Power. All political power is inherent in the people, and governments derive their just powers from the consent of the governed.” The latter (§ 1), is evidently the statement of a fundamental principle inhering in the formation of the state and federal governments. It has no application to the distribution of the sovereign power of the government by the people. The legislature represents this sovereignty of the people, except as limited by the constitution. The first (§ 30), is apparently the expression that the declaration of certain fundamental rights belonging to all individuals and made in the Bill of Rights shall not be construed to mean the

abandonment of others not expressed, which inherently exist in all civilized and free states. Those expressly declared were evidently such as the history and experience of our people had shown were most frequently invaded by arbitrary power, and they were defined and asserted affirmatively. Consistently with the affirmative declaration of such rights, it has been universally recognized by the profoundest jurists and statesmen that certain fundamental, inalienable rights under the laws of God and Nature are immutable, and cannot be violated by any authority founded in right. The right to hold property by use and acquire by labor or occupancy is usually defined as a natural one, but such right, according to the same primitive law, ceased upon abandonment of its use. This view is well stated by Blackstone:

“The most universal and effectual way of abandoning property is by the death of the occupant; when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him: which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as *absolute individuals*, and unconnected with civil society: for, then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed.” 2 Blackstone, *Commentaries*, 10.

That the right to control the disposition of property after death and to devise by will is conventional has been the settled view of the highest judicial authority in perhaps all civilized countries. The supreme court of the United States, in *Magoun v. Illinois Trust & Savings*

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

Bank, 170 U. S. 283 (18 Sup. Ct. 594), upon a full statement of the history and authority of such taxes, said:

"It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

Inheritance tax laws have been in force in the state of Pennsylvania for sixty-five years or more, and in a number of other states for a considerable time. The main features in all these statutes are substantially the same, and their constitutional validity has been affirmed in every court in which they have been challenged, both state and federal, except in instances which arose where their validity was assailed on the ground of constitutional restrictions, as in the Wisconsin and New Hampshire cases heretofore mentioned. The objection urged here, that the statute is in conflict with §§ 1, 2, and 5 of article 7 of the state constitution, relating to taxation, is not tenable, because the charge made upon the passing of the estate is not a tax on property. It is an impost or excise on the right to pass the estate and the privilege of the devisee to take. That it is not within the provision relating to the tax on property is well settled by practically unanimous authority. In the following authorities will be found clear discussions and conclusive adjudications of both the legislative competency to enact such laws and the definition of

the nature of the charge levied on the right to pass the estate: *United States v. Perkins*, 163 U. S. 625 (16 Sup. Ct. 1073); *Strode v. Commonwealth*, 52 Pa. St. 181; *Eyre v. Jacob*, 14 Grat. 422 (73 Am. Dec. 367); *Schoolfield's Exr. v. Lynchburg*, 78 Va. 366; *State v. Dalrymple*, 70 Md. 294 (17 Atl. 82, 3 L. R. A. 372); *Clapp v. Mason*, 94 U. S. 589; *In re Merriam's Estate*, 141 N. Y. 479 (36 N. E. 505); *State v. Hamlin*, 86 Me. 495 (30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569); *State v. Alston*, 94 Tenn. 674 (30 S. W. 750, 28 L. R. A. 178); *Dos Passos, Collateral Inheritance Tax*, 20; *In re Wilmerding*, 117 Cal. 281 (49 Pac. 181); *Minot v. Winthrop*, 162 Mass. 113 (38 N. E. 512, 26 L. R. A. 259); *Gelsthorpe v. Fur-nell*, 20 Mont. 299 (51 Pac. 267, 39 L. R. A. 170); *Scholey v. Rew*, 23 Wall. 331.

It may be said that it has in principle been determined by this court in *Fleetwood v. Read*, 21 Wash. 547 (58 Pac. 665, 47 L. R. A. 205). There the court observed of a license tax:

"Some question was raised by the court at the time of the argument of this case in relation to the ordinance being in conflict with §§ 1, 2 and 9 of art. 7 of the state constitution, which provide for uniformity in taxation. Counsel for the respondent was requested by the court to furnish it with a brief on that subject, which he did, and upon an examination of the cases cited and of other cases, we have become convinced that the question raised by the court was not a question pertinent in this case; that, under the great weight of authority, a tax on occupation, business, etc., is not, in legal contemplation, a tax on property, which falls within the inhibition imposed by the usual constitutional provisions in relation to uniformity of taxation; and, in consideration of the fact that the state constitution is a limitation upon the actions and powers of the legislature instead of a grant of power, that the power of the legislature to tax trades, professions and occupations

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

is, in the absence of constitutional restriction, a matter within its absolute control and resting entirely in sound legislative discretion.”

2. “The inheritance tax shall be and is to be levied on all estates subject to the operation of this act on all sums above the first \$10,000.00, where the same shall pass to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, or the lineal descendant of an adopted child, one (1) per centum. On all sums not exceeding the first fifty thousand dollars, of three per centum, where such estate passes to collateral heirs to and including the third degree of relationship, and to six per cent. where such estates pass to collateral heirs beyond the third degree or to strangers to the blood. On all sums above the first fifty thousand dollars and not exceeding the first one hundred thousand dollars, four and one-half per centum to collateral heirs to and including the third degree, and nine per centum to collateral heirs beyond the third degree or to strangers to the blood. And on all sums in excess of the first one hundred thousand dollars the tax shall be six per centum to collateral heirs to and including the third degree, and twelve per centum to collateral heirs beyond the third degree or to strangers to the blood.” Laws 1901, p. 68, § 2.

It is urged that the above section is invalid because of the exemption of \$10,000 in value from the portion of the estate devised to the first class mentioned, which exemption is not extended to collateral heirs or strangers to the blood. The rule of equality in taxation is invoked against this exemption. It may be observed that the rule invoked does not forbid a liberal classification for purposes of taxation. The classification made here is manifestly reasonable. There is no inequality among the members of the same class. This objection is discussed in many of the authorities heretofore cited. It is so completely met and disposed of in the case of *Magoun v. Illinois Trust & Savings Bank, supra*, that it must be convincing here.

It is concluded that the statute under consideration relative to taxation of inheritances provides for an excise or impost on the devolution of the estate after the death of the owner, and it is not in conflict with any implied or express provision of the state constitution, or any infringement upon the limitations of the federal constitution, that the exemption of \$10,000 inures to the benefit of the first class specified therein. The decree is affirmed.

DUNBAR, MOUNT and ANDERS, JJ., concur.

[No. 4453. Decided December 16, 1902.]

J. W. BULLOCK, *Respondent*, v. WHITE STAR STEAMSHIP COMPANY, *Appellant*.

CARRIERS — BREACH OF CONTRACT TO CARRY PASSENGER — MEASURE OF DAMAGES.

In an action against a transportation company for failure to perform its contract to deliver plaintiff and his men at their destination, plaintiff is entitled to recover what it cost to live at the point where they were compelled to disembark, the cost of supplies and outfit to take them from there to their destination, the loss of time occasioned by not being landed at their point of destination, and the value of wages in their proposed line of work, which the party lost by reason of the delay (*Ransberry v. North American T. & T. Co.*, 22 Wash. 476, followed).

SAME — EVIDENCE — RATE OF WAGES.

In an action for damages for causing plaintiff to disembark at Nome, while his contract of carriage required that he should be landed on Port Clarence Bay, evidence of the rate of miners' wages current at Nome was admissible, where there was testimony that they were the same at both points, and where it is shown that plaintiff lost several days' time at Nome, while preparing to outfit for the trip to Port Clarence Bay.

SAME — RELEVANCY OF EVIDENCE — RELEASE OF DAMAGES.

Where the plaintiff was claiming damages on account of the loss to himself by reason of the delay and extra expense he was

Dec. 1902.]

Syllabus.

put to on account of defendant's failure to carry him and his men to their destination, and was not seeking to recover for damages suffered by the men in his employ, defendant was not entitled to put in evidence the release by one of the men of all damages on his own account.

SAME — SOURCES OF INFORMATION.

In an action against a transportation company for failure to carry passengers to their destination according to contract, to which the defense of impossibility of performance was interposed on the ground that at the time of its failure the waters of the bay at the point of destination were ice-locked, the defendant is not entitled to put in evidence the sources of its information.

SAME — ACT OF GOD — ICE BLOCKADE.

A transportation company that has contracted to deliver passengers at a destination in Alaska, and made no contract excusing non-performance in case the ice had not cleared from the port, cannot invoke the failure of the ice to disappear as an act of God for which it should not be held responsible.

SAME — LIMITATION OF CARRIER'S LIABILITY — CONSTRUCTION OF CONTRACT.

Plaintiff bought a ticket from Seattle to Port Clarence, about one hundred miles north of Nome, Alaska, but the voyage was abandoned at Nome by the carrier, because of reports of ice in Port Clarence Bay. The steamer ticket, signed by both parties, provided that "if the purchaser of this ticket cannot for any reason be safely landed at the port of destination upon arrival of the vessel thereat, he may be landed at the next port reached by the vessel upon the then voyage at which such landing can be safely made." *Held*, that an instruction which told the jury, in effect, that such provision of the contract did not apply because the voyage had been abandoned at an intermediate point, was properly given.

WITNESSES — EXAMINATION.

The fact that a witness had stated he could not tell "the amount exactly" of goods lost would not be ground for excluding his answer to the further question, "State the amount as well as you can, to the best of your knowledge," since it was competent for him to estimate the amount to the best of his knowledge.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE — WANT OF DILIGENCE.

New trial on the ground of newly discovered evidence was properly denied, where it appears that before trial defendant had

procured the names of the new witnesses upon written interrogatories propounded to plaintiff several months before trial, but through a want of diligence had failed to obtain their addresses as well.

SAME—EXTENSION OF TIME FOR FILING AFFIDAVITS.

Refusal of an extension of time for filing affidavits in support of a motion for a new trial would not be error, where it appears that the affidavits would not establish a ground for a new trial.

Appeal from Superior Court, King County.—Hon. R. C. STRUDWICK, Judge *pro tem.* Affirmed.

Richard Saxe Jones, for appellant.

Austin & Jeffery and *John B. Hart*, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This action was brought by respondent, alleging a breach of contract of carriage. Respondent purchased of appellant seven tickets for himself and six men from Seattle, Washington, to Port Clarence, Alaska. These tickets were to be used on the steamship Oregon, sailing from the port of Seattle on June 1, 1901. On the same steamer plaintiff shipped a quantity of miners' supplies to the same point. Port Clarence is a circular bay or body of water in Alaska, almost surrounded by low land and about twelve miles in diameter, connecting with Bering sea by a narrow channel. The steamer sailed on the appointed date and arrived at Nome, Alaska, on the 16th day of June. Nome is about 100 miles southwest of Port Clarence Bay, and the last port where the steamer landed on her outward voyage before reaching Port Clarence, which latter port was at the end of her voyage. Upon the arrival of the steamer at Nome, it was learned that Port Clarence Bay was ice-bound, that the ice extended some distance out in the sea, and steamers could not enter the bay. When this fact was learned, a meeting of all the

Dec. 1902.] Opinion of the Court.—MOUNT, J.

passengers bound for Port Clarence was held on board the vessel, and the officers of appellant company stated to the meeting, at which respondent was present, that, if all the passengers were willing to be landed on the "spit" which separated the bay of Port Clarence from the sea, they would be so landed; or, if they objected to that, then they could disembark at Nome and would be sent forward in the first vessel sailing from Nome, or they might remain on board and go back to Seattle, and return on the next trip. Nearly all the passengers, about 140 in number, elected to disembark at Nome. Respondent, however, insisted that he should be carried to Port Clarence, or to the spit named. There was no landing place at this spit. Appellant refused this request, and told respondent that he could either return to Seattle or disembark at Nome. Without the knowledge of respondent, appellant sent respondent's baggage ashore. Respondent thereupon delivered up his bill of lading for his freight and disembarked at Nome. He demanded of appellant \$5 per day for each of his men for expenses of living at Nome. This demand was refused by the appellant. The respondent, not having been informed as to the time of the arrival of another vessel (the time being indefinite and unknown on account of ice conditions), and without waiting therefor, proceeded to build small boats, and started therein from Nome to Port Clarence, where he arrived on the 17th day of July, 1901, some ten days behind the passengers who waited for another vessel sailing from Nome. On the trial in the court below the jury found a verdict in favor of respondent in the sum of \$3,000. On a motion for a new trial the lower court required the respondent to remit \$1,000 of this sum, and entered a judgment against appellant for \$2,000. From this judgment appeal is taken.

It is alleged as error that the court permitted respondent

to testify to the amount it cost him to live and keep his men at Nome, and the cost of his supplies and outfit to take himself and men from Nome to the point of Port Clarence. This evidence is clearly within the rule laid down by this court in *Ransberry v. North American T. & T. Co.*, 22 Wash. 476 (61 Pac. 154), and was therefore not error.

Several errors are alleged because the court permitted evidence to show that respondent was not landed at his point of destination within a reasonable time, and therefore was caused additional expense in proceeding to his objective point beyond Port Clarence, and for loss of time occasioned by such delay. These elements, also, under the rule announced in the *Ransberry Case, supra*, are proper elements of damage, and no error was committed on this account.

It is alleged as error that the trial court permitted evidence of the value of miners' wages at Nome. The witness had testified that the wages at Nome were the same as at Teller, on Port Clarence Bay; moreover, he had also testified that plaintiff lost seven days' time with his men at Nome; and it was therefore not error to state the rate of wages current at that place.

Respondent was asked to state the value of the goods lost on the way from Nome to Port Clarence by reason of the elements. He answered: "I cannot tell the amount exactly." He was then asked the question: "State the amount as well as you can, to the best of your knowledge." This question was objected to upon the ground that the witness had already said he could not state the amount. But we think the witness had not said that he could not state the amount, but had simply stated that he could not state the amount exactly; meaning, of course, that he could not tell to a cent what his loss was. He certainly

Dec. 1902.] Opinion of the Court.—MOUNT, J.

was authorized to estimate the amount to the best of his knowledge, and this was the question which was asked. There was no error in this. The evidence was competent to go to the jury, and to be considered by them for what it was worth.

One of the men the respondent claimed to have taken with him on the trip north was a man by the name of Mahlon Groo. The appellant offered to show that it held the release of Mr. Groo of all claim for damages on his account. This the court refused, and error is based on this refusal. The respondent in this action was claiming damages on account of the loss to himself by reason of the delay and extra expense he was put to, and not for damages occasioned to the men in his employ. It is clear that a settlement with Groo for damages accruing to him could not affect the claim of the respondent. It was not error, therefore, to exclude the evidence.

Errors are alleged on account of the refusal of the trial court to permit appellant to show from what persons the master of the vessel and the general agent of the appellant received information that it was impossible for the ship to land or get into Port Clarence Bay, and also what was said by such persons to the master and the agent. The court, in ruling upon these objections, said: "You may tell what information you received, but it is not admissible what anyone told you." What the court meant by this, evidently, was that the witness might state what information he had received, but not who it was that gave him the information. If this evidence was admissible at all, it was admissible for the purpose of showing an excuse on the part of the master for not trying to land his vessel at Port Clarence, where a landing was impossible. The fact that Port Clarence Bay was closed to navigation on account of ice was the fact to be proven, and, if such was the fact,

it was certainly immaterial how or from whom such information was obtained. If such was not the fact, the appellant would certainly not be excused from performing its contract of carriage, no matter what its sources of information were. The appellant must act on such information at its peril. If the information was true, the appellant, in the name of diligence, would not be required to do a useless act. If the information was not true, the fact that it was obtained from high and reliable sources would not excuse the appellant from complying with its contract. The sources of information were therefore immaterial.

In this connection the appellant insisted at the trial, and insists here, that the conditions prevailing at Port Clarence were conditions over which it had no control, and that the abandonment of the voyage at Nome was made necessary by the fact that ice had not, at the time of the arrival of the vessel, cleared so as to open Port Clarence Bay to navigation; that this condition was caused by the act of God, on account of which the appellant would be released from fulfilling its contract. The rule was laid down in *Smith v. North American T. & T. Co.*, 20 Wash. 580 (56 Pac. 372, 44 L. R. A. 557), that, in order to excuse non-performance of a contract of carriage on the ground that an act of God made it impossible, there must be no want of diligence and no negligence and no want of judgment or skill on the part of the person whose duty it was to perform the contract. It certainly cannot be contended that a transportation company engaged in carrying passengers from one point to another may enter into contracts to carry passengers to ports which it has no knowledge or information that it can reach, and which in fact it cannot reach. It is the duty of such company to know that the contract can be fulfilled, or to fully acquaint intending passengers of the fact that uncertainty exists, and provide

Dec. 1902.] Opinion of the Court.—MOUNT, J.

therefor in the contract of carriage. It will not do to say that at the time the contract in this case was made the appellant did not know and had no means of finding out that the voyage could not be made, and then say it was excused because the condition of the season was such that the winter ice had not disappeared from the point to which it had agreed to carry its passengers; that the condition of the season was the act of God. Usual conditions of the seasons must be taken notice of. An act of God, to relieve from performance of a contract, must be such as reasonable prudence and foresight could not have guarded against. The fact that ice had not disappeared from the bay of Port Clarence when appellant arrived there cannot be held to be an act of God.

"The passenger, when he buys transportation of a company, must necessarily rely upon the company's information concerning the practicability and feasibility of the trip contracted for." *Smith v. North American T. & T. Co., supra*, p. 584.

"When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract. This is founded in reason and authority." *Hand v. Baynes*, 4 Whart. 204 (33 Am. Dec. 54); *West v. The Uncle Sam*, 1 McAll. 505, 507; 3 Thompson, *Commentaries on Negligence*, § 3651.

It was the duty of the appellant to have informed respondent, at the time he purchased the tickets, of any uncertainty in the voyage, and to have contracted with reference thereto.

This brings us to a consideration of the contract of carriage. There was a clause in the ticket purchased by respondent, which was signed by both appellant and respondent, as follows:

"If the purchaser of this ticket cannot for any reason be safely landed at the port of destination upon arrival of the vessel thereat, he may be landed at the next port reached by the vessel upon the then voyage at which such landing can be safely made."

In reference to this clause the court instructed the jury as follows:

"I charge you that under this form of contract the right of defendant to land passengers and freight at the next port reached by the vessel only arises upon the then voyage upon the arrival of the vessel at the port of destination; and if you find from the evidence that the steamship Oregon never arrived at said port of destination, or never proceeded further than the port of Nome, Alaska, then such finding cannot avail defendant as an excuse for failure to transport the plaintiff, his men and freight, to the point of destination named in said contract, to-wit, the port of Port Clarence, Alaska."

There can be no doubt that the instruction of the court is a literal construction of the clause in the contract. By this instruction the court, in effect, told the jury that the clause did not apply to this case, because it was conceded at the trial that the vessel did not proceed further than Nome. The excuse for not proceeding further was that it was impossible for her to reach that point at that time. The phrase "upon arrival of the vessel thereat" does not necessarily mean that the vessel must actually arrive and land at the point of destination, but means that, if the vessel or the passengers cannot be safely landed, the vessel may proceed to the next port where landing can be made. "The next port reached" clearly means the port beyond the place of destination reasonably near on the line of voyage. It certainly was not intended by this contract that the passenger may be landed at some intermediate port, and that such landing would be a compliance with the contract.

Dec. 1902.] Opinion of the Court.—MOUNT, J.

For example: If the vessel on her outward voyage had stopped at Victoria the first day out, and there learned that the ice accumulated during the winter season had not yet freed Port Clarence, the point of destination, so that the vessel could enter there, and if the port of Victoria was fifteen days distant from Port Clarence, but the nearest landing place thereto, no one would argue that the respondent, under this contract, could be landed at Victoria. The voyage from Seattle to Nome occupied sixteen days. It required one day more to reach Port Clarence. Nome was the last intermediate point on the outward voyage. When the vessel arrived at Nome, the voyage was there abandoned. We think the reasonable construction of the contract under consideration, and what the parties thereto evidently intended, was that, upon the arrival of the vessel at the point of destination, or near thereto, or at some intermediate place, where it was discovered that a safe landing of the passenger could not be made at the point of destination, then he may be landed at the next nearest point beyond the point of destination reasonably near, where landing may be safely made. It was not the duty of the appellant to attempt the impossible, or to go beyond Nome on a fruitless voyage. If it was a fact that the vessel could not possibly make the port of Port Clarence with safety to her passengers and herself, she was not compelled to attempt it. She was, however, compelled to proceed to the next safe landing beyond that point, or care for her passengers until she could land them at the point agreed upon. She could not abandon her voyage and compel her passengers to disembark at some intermediate point without their consent. For these reasons the instruction of the court that the contract did not apply to the facts in the case at bar, which was the effect of the instruction, was not error.

The controlling question in the case was a question of fact, viz., did the respondent elect to be landed at Nome? This was a question for the jury, and was properly submitted by a fair instruction, and the jury found upon it in favor of respondent.

Several exceptions are based upon instructions requested by appellant and refused by the court. The substance of part of these instructions was given, and, of those not given, it is sufficient to say that they were instructions which assumed the conditions prevailing at Port Clarence Bay to be an act of God, and, for the reasons heretofore considered, it was not error to refuse them.

When the motion for a new trial was filed, appellant requested an extension of time within which to file affidavits in support thereof. Several affidavits were also filed setting up newly discovered evidence. From these affidavits, it appears that, within a day or two after the trial, two of the persons whom respondent testified were in his employ came forward and denied that they were in the employ of the respondent on the trip north. They also stated that they were on the trip on their own account, and that respondent did not pay out any money for them. Two of them were in Seattle, where the trial was had, at the time thereof, and were not subpoenaed or called as witnesses. Appellant alleges in the affidavits that it did not know of these witnesses, and had no means of finding out before the close of the trial that they were in Seattle. Several months before the time of the trial, appellant propounded written interrogatories to respondent, one of which asked the names of these parties, and, in answer, respondent gave the names of the men, some of which names, however, were not correctly spelled. Respondent was not asked to give the addresses of these men. Appellant, at the time the question was propounded, had the

Dec. 1902.]

Syllabus.

address of one of the men, viz., Mr. Groo. If appellant had asked for the addresses of these parties and had not received them, there would, no doubt, have been cause for complaint. It would certainly have been an easy matter to ask for the addresses as well as the names of the parties. The addresses, it seems, would have been necessary to identify them, as well as to find them. This omission shows such a want of diligence that we think it was not an abuse of discretion of the trial court in not extending the time for filing affidavits, and for the same reason it was not error to overrule the motion for a new trial.

The judgment is affirmed.

REAVIS, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 4840. Decided December 17, 1902.]

JAMES ROBINS, *Respondent*, v. L. L. PAULSON, *Appellant*.

APPEAL — INSUFFICIENCY OF EXCEPTIONS TO FINDINGS — AFFIRMANCE OF JUDGMENT.

The insufficiency of appellant's exceptions to findings of fact would not entitle respondent to an affirmance of the judgment, since the question of whether the conclusions of law legitimately flow from the findings of fact always remains open for investigation.

LOGGING — LIEN ON MANUFACTURED LUMBER.

One who assists in cutting logs in the woods for a saw mill is entitled to a lien upon the finished product after manufacture at the mill, as long as such product remains under the control of the manufacturer, when the latter is the same party who employed the lien claimant to work in the woods.

Appeal from Superior Court, Clarke County.—Hon. ABRAHAM L. MILLER, Judge. Affirmed.

Mitchell & Tanner, for appellant.

A. H. Imus, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal from a judgment establishing a lien on certain railroad ties and lumber in Clarke county, Washington. The respondent moves the court for judgment upon the findings of the court below and to affirm the judgment, for the reason that no exceptions have been taken to the findings of fact, specifically pointing out what parts of said findings are excepted to. The exception is general to all the findings of fact, and, under the rule announced in *McPherson v. Smith*, 14 Wash. 226 (44 Pac. 255), *Washington Brick, etc., Co. v. Adler*, 12 Wash. 24 (40 Pac. 383), and the uniform line of decisions on this subject, the exception was not sufficient unless it appears that all the findings were erroneous. Many of the findings in this case are uncontested. This, however, will not justify the affirmance of the judgment, but leaves always the question of whether the conclusions of law legitimately flow from the findings of fact, and, in this case, leaves for the consideration of the court the main contention of the appellant, that no lien attaches to lumber or railroad ties manufactured at the saw mill, for work and labor performed in the woods in obtaining the saw logs from which the lumber was manufactured. It is earnestly contended by the appellant that under the provisions of §§ 5930 and 5931, Bal. Code, there are two distinct liens, viz., a lien for performing labor on logs, etc., which lien must be filed upon said logs before they are manufactured into lumber, and a lien for persons performing work or labor or assisting in manufacturing said logs and other timbers into lumber and shingles. *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165 (25 Pac. 1070), and *Winsor v.*

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

Johnson, 5 Wash. 429 (32 Pac. 215), are cited to sustain that contention. The former case decided simply that no lien was given by statute for the manufacture of shingles. In *Winsor v. Johnson*, *supra*, however, this question was before the court, and was decided in accordance with appellant's contention. But since those decisions the lien law has been amended; first in 1893, reported in Session Laws of that year, on page 19, the effect of which was to enlarge the definition of lumber, to make it include shingles and beams, joists, planks, boards and other articles manufactured from saw logs or other timber, and again in 1895, reported on page 175, Session Laws of that year (§ 1). Afterwards the question was again presented to the consideration of this court in *Campbell v. Sterling Mfg Co.*, 11 Wash. 204 (39 Pac. 451). There the identical proposition discussed in this case was determined, and it was held that persons engaged in cutting shingle bolts to be used in the manufacture of shingles were entitled, under the laws of 1893, to a lien upon the shingles as long as they were under the control of the manufacturer. The findings of fact in this case show that the spars and lumber, the subject of this lien, were, at the time of the filing of the lien and at the time of the trial, under the control of the manufacturer, who is the appellant, and that the work was done at his solicitation and by his authority. In the case above referred to it was said by this court, in construing the statute as amended in 1893:

“We think it is too narrow a construction of this act to hold that the lien should have been filed against the shingle bolts instead of against the manufactured article, as long as the shingles were under the control of the manufacturer.”

The same rule was again announced in *Munroe v. Sedro Lumber & Shingle Co.*, 16 Wash. 694 (48 Pac. 405). We

are not prepared to say that a laborer, who was working for an employer engaged in the logging business for the purpose of manufacturing and selling logs, could neglect the provisions of the lien law as provided in § 5930, Bal. Code, and allow the logs to be sold to and manufactured by someone else, and then pursue the remedy provided in § 5931. But that is not this case. Here the facts found show that the business of the employer, the appellant in the cause, was to manufacture lumber and ties, and that the respondent performed labor and rendered assistance in procuring such logs and ties. The actual sawing of the timber is no more a part of manufacturing the same than the cutting and preparing of such timber for the saw. In one case the manufactured product of the laborer would be the log; in the other, the manufactured product would be the lumber. We therefore hold that in this case the respondent was entitled to his lien on the lumber.

The findings of the court, we think, sufficiently establish the fact that the lien notice was specific enough; but in any event an examination of the notice convinces us that it was so, and that the lumber was sufficiently described.

The judgment is affirmed.

REAVIS, C. J., and ANDERS and MOUNT, JJ., concur.

[No. 4480. Decided December 17, 1902.]

THOMAS RICHARD JONES, *Respondent*, v. SWIFT & COMPANY, *Appellant*.

NEGLIGENCE — CARELESS DRIVING — LIABILITY OF DEFENDANT — SUFFICIENCY OF EVIDENCE.

In an action against defendant to recover on account of the negligence of the driver of one of its teams, a *prima facie* case

Dec. 1902.] Opinion of the Court.—MOUNT, J.

sufficient to defeat nonsuit was made out, although there was no direct proof of the ownership of the team or the employment of the driver, where the evidence showed the damage was done by a wagon painted and lettered like those of defendant's, drawn by a horse resembling those owned by defendant; that one of its drivers had a team out the day of the accident; and that defendant's wagons had never been used except in its own business.

SAME — QUESTION FOR JURY.

Whether the driver of defendant's wagon was guilty of negligence in driving his wagon against the barriers guarding an excavation in the street, so as to cause them to fall upon plaintiff who was down in the excavation, presents a question for the jury, when the evidence shows that the streets were torn up in the digging of a man hole; that there was but a narrow passageway between the excavation and sidewalk, which was blockaded with teams; that the earth was piled up on three sides of the excavation, and between it and the blockaded teams; that the driver should have known from the conduct of the work that there was a man in the pit; that he attempted to drive between the blockaded teams and the pit, and in so doing drove up on the embankment, thereby striking the boards and barrels used as a protection against the pit, knocking them down on the plaintiff, to his injury.

SAME — CONTRIBUTORY NEGLIGENCE.

In such a case, the fact that the barrels and boards surrounding the pit were not securely fastened would not show as a matter of law contributory negligence on the part of plaintiff in going into the pit, but the question of plaintiff's negligence was properly for the jury.

Appeal from Superior Court, King County.—Hon.
GEORGE MEADE EMORY, Judge. Affirmed.

McClure & McClure, for appellant.

Leroy V. Newcomb (*Lewis & Hardin*, of counsel), for respondent.

The opinion of the court was delivered by

MOUNT, J.—Respondent on August 3, 1901, was in the employ of the Seattle Electric Company, engaged in ex-

cavating a pit for a man hole at the intersection of Second avenue South and Main street, in the city of Seattle. The course of Second avenue South is north and south, and that of Main street east and west. The pit at the time mentioned was about ten feet deep, about seven feet square, and had earth embanked upon the south, east, and north sides. A trench about five feet wide, which had been dug into the pit from the west side, kept that side of the pit open. The embankment of earth around the three sides of the pit was from two to three feet high, the highest point of the embankment being at the southeast corner. Four barrels were placed on top of this embankment, one at each of the four corners of the pit, and planks were loosely laid from one barrel to another, thus inclosing the pit. The pit in the center of the street, with its surrounding embankment of earth, and the trench leading into the pit upon Main street from the west, blocked all traffic north and south upon Second avenue South, excepting through a narrow passageway along the east side of the pit. At the time of the accident complained of, this passageway was partly filled by a loaded truck, which had become stalled and was stopped opposite the east side of the pit. On the north were a number of teams going south, waiting behind the truck, and on the south were a number of teams headed north, all waiting for the passageway to clear. At this time a light wagon, drawn by one horse, was driven up Second avenue South from the south, and, without waiting for the passageway to clear, was driven between the truck and the pit against the embankment on the east side of the pit, and struck either the barrel on the southeast corner, or one of the boards lying across the barrels. The barrel on the northeast corner fell into the pit and struck the respondent on the back, and the barrel on the southeast corner fell on the first barrel, the

Dec. 1902.] Opinion of the Court.—MOUNT, J.

two barrels injuring respondent. Respondent, in his complaint, alleged that the wagon so driven belonged to appellant and was driven by appellant's servant. Appellant, by its answer, denied that it or its servant caused the accident, and alleged that the accident was caused by the negligence of respondent's employer, the Seattle Electric Company, and that respondent had by his own negligence contributed to the injury. Respondent denied these allegations by his reply. Upon a trial the jury returned a verdict in favor of respondent for \$300, upon which judgment was entered, and this appeal prosecuted from the judgment.

Four assignments of error are made in appellant's brief. These four assignments are argued under three heads, all of which go to one question, and that is whether appellant's motion for a nonsuit should have been sustained at the close of the respondent's evidence. When the respondent closed his evidence, there was no direct testimony that the wagon which knocked the barrels into the pit upon respondent belonged to appellant, or that the driver of the wagon was in appellant's employ. There was testimony substantially to the effect that the bed or box of the wagon was painted red; that the wheels were yellow or straw colored; that the name "Swift & Co." was painted on the wagon; and that the same was drawn by a gray horse. The manager of the appellant company in Seattle, called as a witness by respondent, also testified that Swift & Co. owned two wagons in Seattle and three horses; that the wagons were lettered with its name, and the box painted red, and the running gear painted yellow; that one of the horses was a dark gray, and the other two "a sort of spotted gray"; that he did not know of any other wagon in Seattle on that date bearing the name of Swift & Co.; that one of the wagons was used on that day, and was

driven by a servant of Swift & Co.; and that it had never allowed either of the wagons to be used by any other person. This evidence, it seems to us, clearly made a *prima facie* case that the defendant was the owner of the wagon, and that the same was in the charge of the servant of the defendant. The case of *Edgeworth v. Wood*, 58 N. J. Law, 463 (33 Atl. 940), is directly in point. It was there said:

“All the witnesses who saw the accident and noticed the wagon which ran over plaintiff unite in declaring that it was painted as were the wagons of the company and that it was marked with the company’s name and device. Considering the great improbability that any other owner of a wagon would thus paint and mark it, a plain inference could be drawn from the evidence that the wagon in question was in the ownership of the company. If that inference be drawn, it is sufficient to establish *prima facie* that the wagon, being owned by the company, was in its possession, and that whoever was driving it was doing so for the company.”

In support of this the court cites the following cases: *Joyce v. Capel*, 8 Car. & P., 370; *Norris v. Kohler*, 41 N. Y. 42; *Svenson v. Atlantic Mail Steamship Co.*, 57 N. Y. 108; *Pittsburg, etc., Ry. Co. v. Callaghan*, 157 Ill. 406 (41 N. E. 909); *Schulte v. Holliday*, 54 Mich. 73 (19 N. W. 752).

It is next argued by the appellant that the motion for a nonsuit should have been sustained, because the appellant was not chargeable with negligence, under the evidence. The evidence of the plaintiff, which we must assume to be true in considering this point, was to the effect that the streets were torn up; that there was but a narrow passageway between the pit and the sidewalk; that the passageway was blocked with teams; that the earth excavated from the pit was piled up between these teams and

Dec. 1902.] Opinion of the Court.—MOUNT, J.

the pit; that a man by the name of Santmyer, in charge of the work, was standing on the top of this pile of earth, directing the plaintiff, in the pit below, how to do the work, when appellant's servant drove up and turned in to the left, and attempted to go between the teams and the pit, and, in so doing, struck the barrels and boards used as a protection for the pit, knocking the barrels into the pit. Appellant's servant was negligent in driving upon the embankment and against the barrels; if he knew, or, as a reasonably prudent man, should have known, that someone was in the pit, liable to be injured thereby. If there is substantial evidence of negligence, upon which minds may reasonably differ, then this question must be submitted to the jury. We think the evidence as stated above made a case for the jury. The cases of *State ex rel. Menger v. Lauer*, 55 N. J. Law, 705 (26 Atl. 180, 20 L. R. A. 61), and *Walkup v. May*, 9 Ind. App. 409 (36 N. E. 917), relied upon by appellant, are clearly distinguishable from the case at bar. In the former, where the plaintiff had set up a surveyor's transit in the middle of the public street and left it standing there without anyone looking after it, where it was plainly in sight, and where the roadway for vehicles was sixty feet wide, and the street was otherwise unoccupied, and the defendant, driving slowly along the street, was looking at some houses being built on the side of the street, and, without seeing the transit or knowing it was there, drove over the instrument and injured it, the court says:

“The street was unobstructed, except by the plaintiff's instrument. The defendant did not see the instrument, and he had no reason to expect to encounter an obstacle of that or any other character.”

In the case of *Walkup v. May*, *supra*, which was a case

where the defendant's servant did not turn out of his road to permit plaintiff to pass him on the street, the court said:

"It [the verdict] does not show that Sharpe saw appellant before the accident, nor in time to have turned out for him. Neither does it appear that it was light enough for him to see him, nor that he was not on the lookout."

In the case at bar it was broad daylight. The street was obstructed. A man was standing on the obstruction, directing the plaintiff in the pit below how to do his work, and the appellant's servant must have known both that the pit was there, and that the man was standing on the embankment, because he had to drive against the embankment, three feet high, between the pit and a number of teams which were blocked. While he possibly could not have seen the plaintiff in the pit, yet, from the facts which were so apparent, he must have known that some person was there, and that his act was extremely dangerous to anyone that may have been in the pit.

It is further argued that the motion should have been sustained because the respondent's negligence contributed to the injury. This negligence is claimed because the barrels and boards placed on the embankment around the pit were unsecured, and respondent should have known that they were likely to be knocked down and fall into the pit. This also was a question for the jury. It does not necessarily follow that, because these barrels and boards were placed loosely around the pit, respondent must be held to know that they were likely to be knocked into the pit. They were placed on top of an embankment which was from two to three feet high, and which of itself was sufficient to lead one to suppose that teams would in daytime avoid it. The barrels and boards were out of the reach of ordinary travel upon the street, and one would naturally suppose that no one would drive upon or ordinarily go

Dec. 1902.]Syllabus.

upon the embankment so as to interfere therewith. If the barrels and boards were so placed as to lead an ordinarily reasonable person to believe that no one would knock them down, it was not negligence for the plaintiff to go into the pit with barrels and boards so placed. These conditions are entirely different from those surrounding a person standing upon a street where wagons and horses are passing, who pays no heed to the dangers and takes no care to avoid them, as was the case of *Evans v. Adams Express Co.*, 122 Ind. 362 (23 N. E. 1039, 7 L. R. A. 678), cited by appellant. It was, therefore, not error to deny the motion.

There is no error in the record, and the judgment is affirmed.

REAVIS, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 4428. Decided December 18, 1902.]

J. S. WINDELL *et al.*, Respondents, v. READMAN WAREHOUSE COMPANY, Appellant.

CONTRACT FOR STORAGE — WAREHOUSE RECEIPT — VARIATION BY PAROL.

Where a party has entered into an oral contract of storage with a warehouseman, such contract governs, and not the terms set forth in a warehouse receipt subsequently mailed to him and which was retained by him without noticing that it contained provisions differing from that of his oral contract, and parol evidence is admissible to show the real contract.

SAME — STATUTORY DEFINITION OF RECEIPT — EFFECT ON CONTRACTS.

The fact that Bal. Code, § 3590, defines the nature of a warehouse receipt would not preclude parties from making a contract of storage upon such terms and conditions as they choose.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Affirmed.

Richard Saxe Jones, for appellant.

E. P. Edsen, John E. Humphries and Harrison Bostwick, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Action against defendant, a warehouse company, for conversion of household goods stored by plaintiffs. The contract of storage was made by plaintiffs with one Readman, a warehouseman in Seattle, who was succeeded by the defendant company, which assumed all the obligations of the contract. The complaint alleged, in substance:

“That the plaintiffs entered into an oral agreement with the said Readman by which the plaintiffs agreed to store and did store with said Readman certain goods, wares, and merchandise, with the agreement and understanding that the plaintiffs were to be absent on an eighteen months’ contract, and would not need the goods for a long time, and that the goods were to be kept in said warehouse until the plaintiffs called for them, and plaintiffs were to pay all charges upon their said goods, all of which was agreed to by the said J. C. Readman.

“That in pursuance of said oral agreement the plaintiffs delivered to the said Readman’s warehouse and put into the care and custody of said Readman, eleven boxes of goods, wares, and merchandise, namely: . . . Said goods were accepted under said contract and agreement, and were left in said warehouse according to the terms and conditions of said agreement. . . .

“That the Readman Warehouse Company, defendant herein, in violation of the contract between plaintiffs and the said J. C. Readman, and without right so to do, sold, scattered, and transferred all the property and effects belonging to the plaintiffs, and converted the same to its own benefit, and disposed of the said property.”

It was also alleged that plaintiffs demanded the goods of defendant, and were informed that defendant had sold

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

the goods for storage charges, and that the proceeds of the sale were insufficient to satisfy such charges. The answer admits that defendant was a warehouseman, and that the goods, as described, were stored and received by it as stated in the complaint, but denies that plaintiffs entered into any oral agreement with Readman for the storage of the goods; and as affirmative defense sets up:

"That the said Readman received the same for storage, and executed and delivered to the plaintiffs his certain warehouse receipt therefor, containing the terms and conditions upon which the same were received for storage, and which said warehouse receipt was in words and figures as follows, towit:

"Preserve this receipt and read its contents.
"Storage. Readman's Warehouse,
"J. C. Readman, Proprietor.
"801-803-805-807-809 First Avenue South, Cor. Dearborn Street.
"No. 2580. Telephone Main 105.

"STORAGE RECEIPT.

"Seattle, Washington, 16 June, 1899.
"J. C. Readman has this day received in store from J. S. Windell the property below described, it being hereby understood and provided that said J. C. Readman shall not be liable for loss thereof by fire or by action of the elements, nor for damage thereto by rats, mice, moths, or other vermin, nor from frost, riot, war, or insurrection, nor any unavoidable damage. Said property to be delivered at this warehouse upon the return of this receipt properly indorsed and payment of charges for storage thereof. This receipt negotiable when duly indorsed by consignor, subject at all times to the conditions hereof and the payment of all charges. Said property so received is represented to be as follows:

"9 boxes H. H. goods.
"1 center table.
"1 rocking chair.

“ ‘The rates of storage upon said property are as follows:

“ ‘\$1.00 for thirty days or fraction thereof. And such charges shall accrue, mature, and become due and payable every thirty days from the date of this receipt.

“ ‘Measurement Weight

“ ‘Any expenses or costs for cooperage, repairs, court costs, or attorney’s fees accruing by reason of the receipt of and storage of said property (for reasons not expressly attributable to the warehouseman) shall be charged to and be a lien upon said property.

“ ‘The warehouseman does not guarantee the contents of any sealed or closed packages.

“ ‘Advances.

“ ‘Charges 25c Kamp.

“ ‘Expenses.

“ ‘Owner’s valuation.

“ ‘Goods covered by this receipt can only be delivered on its surrender, properly indorsed by the person or firm to whom it is issued. Should it be lost or destroyed, a reliable surety company’s bond in twice the amount of the owner’s valuation, subject to the approval of the warehouseman, will be invariably required before duplicate receipt is issued or goods delivered.

“ ‘J. C. Readman.’ ”

It further alleges that no other or further contract was made with plaintiffs, and that, after due notice of sale, the said goods were thereafter sold to pay said storage charges; that at such sale the goods were sold for \$9.75, and that the storage charges then due defendant thereon were \$20.45. The goods were stored about June 16, 1899, and the sale for storage charges was made on the 26th day of March, 1901. On the trial the plaintiffs tendered evidence tending to prove the oral contract set forth in the complaint, whereupon counsel for defendant inquired for the warehouse receipt set out in the answer, which was then produced by plaintiffs, and exhibited to the court. Defend-

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

ant then objected to any evidence relating to the oral contract on the ground that it tended to vary and contradict the receipt given to plaintiffs. The objection was overruled. The plaintiff husband was then permitted to testify and state the agreement alleged as follows:

"Q. Now you may state, Mr. Windell, what you did with reference to storing your goods in the Readman warehouse. A. I took goods there on June 16th— Q. Talk to the jury. A. On June 16, 1899, as I was about to go to Oregon under a contract there, and in fact I was on my way to the depot at the time. I took my goods there, and talked to the clerk in the office—I do not know who he was. I do not know his name—in regard to taking and keeping the goods. Q. He was the party in charge of the office? A. Party in the office, I do not know whether he was the clerk, or Mr. Readman, or who he was, and he said he would keep the goods. . . . Q. Go ahead, and state what occurred there about leaving these goods at this warehouse. A. I went to the warehouse in company with a drayman who had these goods and my baggage that I was taking with me,—trunks,—and I unloaded the goods there; then had the conversation in the office in regard to the goods. I went into the office to take a receipt for the goods. The clerk said that he could not issue a receipt now, but he could—until the goods were placed and measured so as to know what the charges—what space they would occupy, so as to know what the charges would be. He told me to call tomorrow for the receipt for the goods. I told him I could not do that, as I was on my way then to the train that was about to leave; and he says, 'We will measure up the goods, and we will send you the receipt.' I says, 'All right, I will do that'; and then I gave him my address,—what my address would be at Portland, Oregon,—and then I says, 'About the payment of this,' I says, 'I am going where I will be out into the mountains in the mines, and I want to know when I am to pay for these goods,' I says, 'I am going under a contract.' . . . 'I am going to Southern Oregon to take charge of a mining

proposition under an eighteen months' contract. My family is with me, and if I should set up housekeeping, I will send with me, and if I should set up housekeeping, I will send for these goods in a short time; otherwise they will probably be left at the warehouse for the full term, or about that length of time, or perhaps a little longer, until I return to the city.' And with that understanding I left the warehouse, went on to the train, and they were to send me a receipt for the goods to Portland at the address which I gave, which was my permanent address. Q. What did he say about when you would pay for the storage? A. Well, I asked about the payment. As to that, he said, 'You can pay for the goods when you receive them or order them shipped away, as the case may be.'

The court instructed the jury that the burden of proof of the oral contract and its terms was upon plaintiffs, that plaintiffs had the right to make an oral contract, and the law did not compel the contract to be in writing; that, if the jury believed such contract was made, and should also believe that subsequently the warehouse receipt was mailed to plaintiffs, and retained by them, and yet it should appear that the printed matter in the receipt was unread by plaintiffs at the time it was received, that no attention was paid to its contents, and that plaintiffs did not assent to its terms at any time, then the oral contract would be controlling. The jury were also instructed that, if the warehouse receipt was delivered to plaintiffs, and they understood it at the time, and that it expressed the contract of storage, then the written contract contained in it would be controlling, and could not be varied or contradicted in any manner by the oral agreement, or any evidence thereof.

The controlling question presented on this appeal is one of law. Counsel for appellant urges with much earnestness that respondents, having received the warehouse receipt some days after the goods were stored, ought not to be

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

permitted to deny that they assented to its terms; that when the contract was put in writing and printing in the warehouse receipt and delivered to plaintiffs, it could not be varied in its terms by oral evidence. But the warehouse receipt was written and signed by only one of the parties, and it must embody the real contract made between the parties. This seems to be the prevailing view of the best considered decisions. In *Strohn v. Detroit & M. Ry. Co.*, 21 Wis. 562 (94 Am. Dec. 564), plaintiffs delivered to defendant, a carrier, goods to be delivered to a consignee in New York within fifteen days. The property was for shipment to Europe. This knowledge was given to the agent of the defendant orally at the time the goods were delivered to it. The defendant denied the oral contract, and alleged that the only contract made by it was contained in the bill of lading, which exempted it from the liability charged by plaintiffs. In this case it was substantially ruled that, if it should appear that the owner examined the receipt, knew its contents, and did not offer to return it, nor otherwise notify the company of his dissent, it seems that this would be conclusive evidence of his assent. But, if he had previously entered into a special oral agreement with the company for the transportation of the goods, he had a right to presume that the written or printed receipt contained nothing contrary to such agreement, and his failure to make himself at once acquainted with its contents and notify the company of his dissent should not be held to conclude him. In that case the plaintiffs offered to show such a special oral agreement, and also that the company's receipt was not delivered to them until some days after the goods were delivered to the company and shipped by it under the oral agreement. Held, that the evidence should have been admitted to rebut the presumption against them arising from their possession of

the receipt. The same principles substantially are supported by the following cases: *King v. Woodbridge*, 34 Vt. 565; *Bostwick v. Baltimore, etc., R. R. Co.*, 45 N. Y. 712; *Guillaume v. General Transportation Co.*, 100 N. Y. 491 (3 N. E. 489); *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206 (12 N. E. 583); *Missouri Pacific Ry. Co. v. Beeson*, 30 Kan. 298 (2 Pac. 496).

The warehouse receipt must be based upon the agreement of the parties, or assented to by the plaintiffs. If an oral contract has preceded it, its terms must be embodied in the receipt. The vital question, then, is one of fact. The evidence was heard and weighed by the jury under proper instructions from the court. If the evidence on the part of the plaintiffs is believed, an oral contract was made, and its terms are not embodied in the receipt, and the terms contained in the receipt were not understood or assented to by plaintiffs. The statutes of the state are cited as defining the nature of a warehouse receipt, and it is contended that § 3590, Bal. Code, imposed upon plaintiffs the knowledge of the functions of such receipt, and they should be bound conclusively by such knowledge to know its terms. The case of *First National Bank v. Northern Pacific Ry. Co.*, 28 Wash. 439 (68 Pac. 965), is cited as pertinent here. This case determined the negotiability of a bill of lading issued by a carrier when in the possession of a purchaser for a valuable consideration. There was no question between the parties as to the validity of the bill of lading in that case. The statute cited does not change the nature of the contract. There is no prohibition of contract of storage between warehousemen and others upon such terms and conditions as they may choose to make. No change is made in the rights of each party under such agreements.

The other objections raised by appellant upon the re-

Dec. 1902.]

Syllabus.

jection of evidence and instructions have been examined, and no material error is perceived in the ruling of the court. The evidence was conflicting. Its weight, however, was determined by the jury in favor of the plaintiffs.

Judgment affirmed.

DUNBAR, MOUNT and ANDERS, JJ., concur.

[No. 4128. Decided December 20, 1902.]

C. J. LORD, *Appellant*, v. ELIZABETH T. HORR, *Appellant*.

**REFORMATION OF DEED — LAND INCLUDED UNDER TWO CONTRACTS —
MUTUAL MISTAKE — RESCISSION.**

Plaintiff's assignor had purchased a strip of land twenty feet wide off the east side of the land of defendant under a contract of sale, which was assigned to plaintiff, who contracted with defendant for ten feet additional, and a deed was executed conveying a tract described by metes and bounds, which was 30 feet wide on the street and 16.8 feet wide at the rear end of the lot, instead of being a thirty foot strip of land, as the parties had contemplated. The mistake arose from the fact that the lot lines were supposed to run at right angles, while in fact the side lines paralleled one of the streets which was at an angle of 95° 56' with the other. There was no misunderstanding between the parties as to the twenty-foot strip, but the conveyance of an additional ten-foot strip off the east side would have included a portion of defendant's buildings and fruit and ornamental trees, which was not within the contemplation of either of the parties. Plaintiff brought an action to enforce the deed, so as to make it include a thirty-foot strip, and defendant asked for rescission of the whole contract.

Held, that plaintiff was entitled to reformation of the deed so as to properly describe and include the twenty-foot strip covered by the first contract, and defendant was entitled to a rescission of the second contract on the ground of mutual mistake.

SAME — RIGHT TO RELIEF.

The fact that a party asks for rescission as to two tracts of land sold under separate contracts, but included in the deed as an

Opinion of the Court.—FULLERTON, J. [30 Wash.

entirety, would not deprive her of the right to rescind as to that portion of the contract for which she was entitled to relief.

SAME — TENDER — OBJECTIONS NOT URGED BELOW.

Failure to tender purchase money when asking for rescission of a deed upon which it was paid would not preclude the defendant from relief, when issue was taken upon her answer without objection because of such failure, and she had not been placed in default during trial for failure to bring the money into court.

SAME — PLEADING — INCONSISTENT DEFENSES.

In an action for a reformation of a deed, an answer setting up that the deed expressed the contract of the parties, but that, if it did not, there was such a mutual mistake as would authorize a rescission, does not fall within the rule forbidding inconsistent defenses.

Appeal from Superior Court, Thurston County.—Hon. MASON IRWIN, Judge. Judgment modified.

George C. Israel and Frank C. Owings, for plaintiff.

J. W. Robinson, for defendant.

The opinion of the court was delivered by

FULLERTON, J.—This action was instituted to reform a deed. The undisputed facts shown by the record are substantially these: The land involved is situated in the north half of block 82 in the city of Olympia. This block is in form a parallelogram, but is not a rectangle, the streets bounding it upon its north and west sides—Union and Main—forming an angle at their junction of $95^{\circ} 56'$. Prior to the occurrences out of which this controversy arises, the defendant owned all of that part of the north half of the block which lies west of a line run parallel with Main street and 120 feet distant therefrom; the tract being 127 feet in length by 120 feet in width. The plaintiff owned a tract lying immediately east of the defendant's land, and abutting thereon; his lot being of the same length as the defendant's north and south, and 60 feet in width.

Dec. 1902.] Opinion of the Court.—FULLETON, J.

Early in the year 1900 the plaintiff sold his land to one S. G. Simpson, who placed one Mark E. Reed in possession. Thereafter and on July 17, 1900, the defendant and Mr. Reed entered into a contract by which the defendant agreed to sell to Mr. Reed a tract 20 feet wide off the east side of her lot for the agreed price of three hundred dollars. A deed was not executed at that time, because of some unsettled street grade taxes which the parties desired to have adjusted. The contract was reduced to writing, and one hundred dollars of the purchase price paid. In this contract the land agreed to be conveyed was inconsistently described. That portion of the description purporting to give its metes and bounds described a tract 20 feet wide on the Union street end, and some 6.8 feet wide on the other, while the general part of the description described it as being the east twenty feet of the land purchased by the defendant, as described in a certain recorded deed, which would mean a parallelogram twenty feet in width and one hundred and twenty-seven feet in length. As to which of these descriptions is correct, however, there is no dispute in the evidence. Both Mr. Reed and the defendant testify that the description by metes and bounds is erroneous. Before this transaction was completed or the deed executed, the plaintiff repurchased his lot from Mr. Simpson, and at the same time purchased the interests of Mr. Reed in the contract made by him with the defendant. Shortly after the plaintiff repurchased the lot, the defendant called him up by telephone, and asked him if he would take ten feet more of her lot, making thirty feet in all, at the rate named in the contract with Mr. Reed. To this the plaintiff consented, and thereupon drew a deed attempting to describe both tracts, which the defendant afterwards executed; the plaintiff at the same time paying her the balance due upon the purchase price of the first

tract, and the whole of the purchase price of the second. In this deed the land was described as follows:

"Commencing at the north west corner of the land owned by C. J. Lord, in block eighty-two (82), original plat of the town now city of Olympia; thence along the line of Union street thirty (30) feet, to a point; thence at right angles south one hundred twenty-seven (127) feet more or less to the line of A. A. Phillips' property, being equi-distant from Union street and Eleventh street; thence at right angles east along the line of said A. A. Phillips' property, thirty (30) feet more or less, to the south-west corner of the land owned by C. J. Lord in said block eighty-two (82); thence at right angles north along the line of the property owned by said C. J. Lord, one hundred twenty-seven (127) feet, more or less, to the place of beginning."

Owing to the fact that the lines dividing the block were not run at right angles to Union street, but parallel to Main street, this description did not include a strip thirty feet wide off the east side of the defendant's lot, but described a tract thirty feet wide on Union street and 16.8 feet wide on the opposite end. When attempt was made to mark the line on the ground, the discrepancy was discovered. It was also discovered that to run the line parallel with Main street would include in the land conveyed a part of the defendant's improvements, namely, some portion of the woodshed erected on the premises and some fruit and ornamental trees. Attempt was made by the parties to adjust the matter between themselves, but, failing to reach an agreement, this action was begun.

On the disputed questions the court found there was a mutual mistake of the parties. It found that the defendant intended to sell, and the plaintiff intended to purchase, a tract of land thirty feet in width off the east side of the defendant's lot, bounded on the west side by a line run par-

Dec. 1902.] Opinion of the Court.—FULLERTON, J.

allel with Main street. On the other hand, he found that it was not intended by either party that the tract so agreed to be sold and purchased should include any part of the defendant's improvements; finding further that the mistake arose from the fact that both parties believed that the north and south lines of the lot were run at right angles to Union street, when in fact they were not so run. Upon these findings the court entered decree awarding to the plaintiff the land included in the deed, and directed that the defendant repay to him such proportion of the purchase price as the land not included in the deed bore to the part included therein. From the decree, both parties have appealed.

An examination of the evidence convinces us that the court's findings are, in the main, correct. The court seems, however, to have overlooked the fact that there were two separate contracts,—one made between the defendant and Mr. Reed, in which the plaintiff acquired his interests by assignment from Mr. Reed, and the other made directly between the plaintiff and the defendant. As to the first of these there is no dispute. The defendant herself testifies that she agreed thereby to convey to Mr. Reed twenty feet off the east side of her land. This can have but one meaning. It means a tract cut off by a line run parallel with the east end of the land, and twenty feet distant therefrom. As the plaintiff succeeded to the rights of Mr. Reed in the contract, he was entitled, on the payment of the balance of the purchase price, to a conveyance of the whole thereof.

As to the second contract, we agree with the trial court that there was a mutual mistake. While the parties unquestionably understood that the tract agreed to be conveyed was to be ten feet in width its entire length, yet neither of them knew that it would trench upon or include

any of the respondent's improvements. In fact, such a thing was not in contemplation of, nor intended by, either of them. There was as to this tract, therefore, such a mutual mistake as will authorize the defendant to rescind as to it. But it is said that neither under the pleadings nor evidence is she entitled to this form of relief. While her answer may not be technically accurate, enough is pleaded therein to show a mutual mistake, and she prays to be permitted to rescind and return the purchase money as to both tracts. As we have shown, she was not entitled to this relief in its entirety, but she is not to be denied the relief to which she is plainly entitled merely because she has asked for too much. The rule is not so onerous. A litigant is entitled to any part of the relief prayed for, falling within the allegations of his pleadings, which is separable from the whole, and which the evidence justifies the court in granting. True, she did not bring the money into court. But issue was taken upon her answer without objection because of her failure so to do, and at no time during the course of the trial was she required to produce the money; much less was she placed in default for not doing so. Advantage of such an omission must be taken in some form in the trial court. Again, it is said that she tried her case upon a different theory,—the theory that the deed, as written, expressed the contract between the parties,—and that there is nothing in the evidence which would justify a rescission. As we understand the record, however, she relied upon both defenses, namely, that the deed expressed the contract, and, if it did not, that there was such a mutual mistake as would authorize her to rescind. Under the Code, she was entitled to set up as many defenses as she had. Bal. Code, § 4913a. It is true, this court has placed an exception on the rule, in so far as it has required that the several defenses be consistent, but,

Dec. 1902.] Opinion of the Court.—FULLERTON, J.

without stopping to point out the differences, it is plain these defenses do not fall within the exception. On the main question, that there was a mutual mistake, the evidence, as we say, is unmistakable.

From these considerations, it is evident that the decree of the trial court is erroneous. It not only does not give to the plaintiff all of the land to which he is entitled, but it makes a new contract for the parties. The plaintiff was entitled to a decree directing a conveyance of the land described in the first contract, as interpreted by the parties making it, and the defendant was entitled to a rescission of the second. She cannot, however, keep both the land and the purchase money. The order of this court, therefore, is that the decree appealed from be reversed; that the cause be remanded, with instructions to direct a conveyance of the first tract mentioned; that the defendant be allowed to rescind as to the second tract, provided she will pay into the lower court, within sixty days from the time the remittitur reaches that court, the purchase price paid her for the same, namely, one hundred and fifty dollars, together with legal interest thereon from the date of the deed in dispute to the time payment is made; and failing so to do, a decree will go against her, directing a conveyance of that tract, also, to the plaintiff. Neither party will recover costs.

REAVIS, C. J., and DUNBAR, MOUNT and ANDERS, JJ., concur.

[No. 4390. Decided December 20, 1902.]

CANADIAN BANK OF COMMERCE, *Appellant*, v. C. E. BINGHAM, *Respondent*.

BANKS — PAYMENT OF FORGED CHECK — LIABILITY FOR NEGLIGENCE.

A bank which pays a forged check drawn upon it in the name of a depositor may, if it acts within a reasonable time, recover the amount thereof from the bank which took the check in course of business, and negligently paid the money upon the indorsement of the check by the payee named, without inquiry into its genuineness, or without requiring any identification of the person presenting such check for payment, or any showing that he was lawfully the holder thereof.

Appeal from Superior Court, Skagit County.—Hon. GEORGE A. JOINER, Judge. Reversed.

Million & Houser, for appellant.

Thomas Smith, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The plaintiff (appellant) is a banking institution doing a general banking business in Seattle. The defendant is a banker doing a general banking business in the town of Sedro-Woolley. The Tyee Logging Company is a logging company operating in Skagit county, and having its principal place of business near Sedro-Woolley, the place of business of defendant, and a patron and depositor of plaintiff, upon whom its checks were from time to time drawn in the course of its business. On the 9th of September, 1901, some unknown person issued seven certain checks in the name of the Tyee Logging Company, on plaintiff, all made payable to fictitious persons, and aggregating the total sum of \$429.85. The checks so issued were forgeries written out on the regular blank checks of

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

the Tyee Logging Company. Some time between the 9th and 11th days of September, 1901, said checks were presented by someone unknown (presumably the person who committed the forgeries) to defendant at his banking house in Sedro-Woolley and were by him cashed after being indorsed by the person presenting the same, in the name of the fictitious payee. Thereafter said checks were duly indorsed by defendant, and presented to plaintiff at its banking house in Seattle, and were by it paid in ignorance of the fictitious indorsements and of the same having been forged. On the same being presented to the Tyee Logging Company, they were repudiated as forgeries, whereupon demand was made by plaintiff upon defendant for the amount so paid out on said checks, and, payment being refused, this action was brought to recover the same. To plaintiff's complaint, defendant interposed a demurrer challenging the sufficiency of the allegations therein contained to state a cause of action, which demurrer was by the court sustained; and, plaintiff electing to stand upon its complaint, judgment was entered in favor of defendant, dismissing plaintiff's action, from which plaintiff appeals to this court.

The ground of error is the action of the court in sustaining the demurrer to the complaint and in dismissing the action. The two essential allegations of the complaint are as follows:

"That at the time of the payment of said check this plaintiff was without knowledge or notice that the same had been forged, and without knowing that the indorsement thereon of the said name thereon, as the same appeared upon said check, was not genuine, but believing that said check had been regularly issued by the said Tyee Logging Company, and believing that the same had been properly indorsed by the owner and holder thereof, and re-

lying upon the subsequent indorsements thereon of the defendant, did pay the said check as aforesaid."

"That at the time of the cashing of said check by the defendant, he was guilty of negligence, in this: that he failed and neglected to have the holder and the person in whose possession said check was at the time of presentation for payment as aforesaid properly identified, or identified at all, and he failed in any manner to use reasonable diligence or care to ascertain whether or not said person so presenting said check was the owner thereof, or was the person named in said check as payee; or was the identical person to whom said check was issued, or to whom it purported to be issued, or that he had any lawful authority, or any authority whatever, to indorse said check, or that he was the lawful holder thereof; that, had defendant used any care or caution, he would have easily discovered that said check was a forgery."

The respondent relies upon the general doctrine that the drawee bank is bound to know the signature of its own depositor, and that, having failed to detect the forgery, and having paid the money on the check, which was presented by the paying bank, it was estopped from recovering back the money so paid. While the appellant concedes the general law to be as so stated, it insists that there is a well defined exception to the general rule, viz., that if it appears that the one to whom payment was made was not an innocent sufferer, but was guilty of negligence in not doing something which plain duty demanded, and which, if it had been done, no loss would have been entailed upon anyone, he is not entitled to retain the moneys paid through a mistake on the part of the drawee bank. We think that this exception must be sustained, and that it has a proper application to the allegations of the complaint. There are several principles of law to be considered in the discussion of this case. One is, as is contended by respondent, that

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

a bank is supposed to know the signatures of its depositors, and that constructive negligence is imputed to it if it pays money on checks over the forged signature of its depositor. This rule, however, must be considered in connection with a second well established rule of law, that money paid through a mistake can be recovered back, and also of a third universal rule, that the transfer of stolen property conveys no title, and that each successive purchaser has recourse upon the party from whom he purchased, because, the consideration for the transaction having failed, and nothing having been conveyed, the contract is void, and the party, having received money for nothing, has no right to retain it. Neither of these rules must be invoked to the entire exclusion of the others, but each is frequently modified by another. Thus, while it is true that constructive negligence is imputed to the bank which pays out money on a check over the forged signature of its depositor, it is also true that it received nothing of value for the money paid for the check, and that no title to the check was transferred by the paying bank. In such a case it might appropriately be said that the doctrine of comparative negligence applies, and that the constructive negligence of the drawee bank was overcome by the active negligence of the paying bank in not using the ordinary precautions which are used by banks, viz., demanding an identification of the person presenting the check, and putting forth some inquiry as to its genuineness before paying it and sending it on, dignified and accredited by its own indorsement, which would tend to lull the suspicions and abate the watchfulness of the drawee bank. In such case, it seems to us, the original and potent negligence which caused the loss to fall on one of two innocent persons should be imputed to the paying bank. Unquestionably the loss would have been its if the drawee bank had recog-

nized the forgery and refused to honor the check. Why should the mere accident, occurring afterwards, of the bank failing to detect the forgery, permit it to shift the loss, which had already been entailed on it, to another? If the delay of the drawee bank in not promptly reporting the forgery had been the means of preventing the payee bank from obtaining recourse on the forgers, and placing it in a worse position than it would have been in if payment had been refused, that would be a question worthy of consideration, but is not a question involved in this case. Certainly the governing principle upon which the respondent is entitled to retain the appellant's money, if he is so entitled, is that by the action of the appellant he has been prevented from recovering the money out of which he had been defrauded by the forger before the appellant had taken any action in the premises; or, stated affirmatively, that he has been prejudiced by the action of the appellant in paying the check instead of allowing it to go to protest. This is in harmony with the undisputed rule that a drawer or maker of a check, who is deceived by a forgery of his own signature, may recover the payment back, unless his mistake has placed an innocent holder of the paper in a worse position than he would have been in if the discovery of the forgery had been made on presentation, and with the rule that allows the maker of a note, who pays it over his own forged signature, to recover, from the person who received it, for money paid by mistake, unless his negligence has caused loss to an innocent purchaser. There are no arbitrary rules of law governing these cases, and none are contended for. There is no reason why there should be in the case at bar. It is stated in many of the authorities that there is a great conflict of authority on this question, but an investigation leads us to the conclusion that this conflict is more seeming than real; for, while the lan-

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

guage of several of the earlier cases gives some color to respondent's contention, and while the general rule is that a bank is responsible for a knowledge of its depositor's signature, and this is asserted in some of the cases with something of vehemence, the language of an opinion must always be construed with reference to the circumstances of the case; and, so construing the cases cited by the respondent, and all other cases which our independent investigation has been able to collate, they have, with few if any exceptions, gone beyond the establishment of the general principle above announced, without attempting to deny the exceptions contended for by appellant, and many of them openly indorse such exceptions.

The case upon which the doctrine contended for by respondent is founded, and which is universally quoted in support of such rule, is an old English case,—*Price v. Neal*, decided by Lord MANSFIELD and reported in 3 Burr. 1,354. This case seems to have attracted some attention from the fact that Lord MANSFIELD stopped the attorney who was arguing the case with the remark that the case could not be made plainer by argument. This was an action for money had and received, brought by Price against Neal. In this case two bills had been forged and paid, as in the case at bar. There is a meager statement of the case, and a still more meager argument by the court. One of the bills, it seems, had been accepted by the drawee before it had been bought by the defendant, and the court remarks:

"The plaintiff lies by, for a considerable time after he has paid these bills; and then found out 'That they were forged,' and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself for nego-

tiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value, *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but, in this case, if there was any fault or negligence in anyone, it certainly was in the plaintiff, and not in the defendant."

It will be seen that even in this case, while stating the general doctrine that it was incumbent upon the plaintiff to be satisfied that the signatures were not forgeries, it is expressly stated that there was no fault or negligence on the part of the defendant, who paid the bills. While the complaint in the case at bar alleges not only general negligence, but specific negligence, to the effect that the paying respondent failed and neglected to have the holder and the person in whose possession the check was at the time of presentation for payment properly identified, or identified at all, outside of the other allegations that, had he used any care or caution, he would have easily discovered that the check was a forgery. So that, construing this opinion in accordance with the rule above announced, viz., with reference to the circumstances of the case, it can scarcely be said to be an authority in favor of sustaining the demurrer to this complaint.

One of the cases cited by the appellant, viz., *Deposit Bank of Georgetown v. Fayette National Bank*, 90 Ky. 10 (13 S. W. 339, 7 L. R. A. 849), decided that where forged checks on a bank, purporting to be drawn in the name of one of its principal depositors, and running through a period of five months before the forgery is discovered, are accepted and paid by the drawee bank to other banks, which accept and pay them in good faith after inquiry of the drawee as to the depositor's account, the drawee bank

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

must stand the loss. After quoting from Lord MANSFIELD's opinion, *supra*, and stating that the doctrine had never been departed from, the court recognized the exception contended for by appellant as follows:

"Nor is it just to say that the rule adopted, requiring the bank to know the signature of its depositor, is without an exception; for it is undoubtedly true that the neglect or knowledge of intervening parties who come into the possession of the check, and receive the money on it from the bank where it is payable, will, in some instances, be of such a character as to enable the bank to recover back the money."

That case was distinguished from the cases maintaining the exception to the rule, and was decided upon the circumstances surrounding it, viz., that, as the court said:

"These checks were continued to be paid during a period of nearly five months before the forgery was discovered,—a fact, it seems to us, which should be decisive of this case."

It is true that Edwards on Bills, Notes and Negotiable Instruments (3d ed.), § 272, announces the rule in *Price v. Neal*, *supra*, accrediting that case as the foundation of the text, but, recognizing the distinction for which we are contending, says, in § 276:

"It is now settled, both in England and in this country, that money paid under a mistake of fact may be recovered, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund."

It will be found that, in all cases where repayment has been refused, it has been on the ground, either that no negligence at all by the paying party has been shown, or that the payment by the drawee bank had placed the paying party in a worse position than he would have been had the

payment been refused. Another case cited, *First National Bank of Marshalltown v. Marshalltown State Bank*, 107 Iowa, 327 (77 N. W. 1045, 44 L. R. A. 131), after announcing the general rule, says:

"The rule, however, has one qualification, introduced by some cases, and which we feel inclined to adopt. When the holder of the check has been negligent in not making due inquiry, if the circumstances were such as to demand an inquiry when he took the check, the drawee may recover."

It would seem that the remark of the court was pertinent to the case at bar, for certainly it is the duty and the ordinary rule of banks, when dealing with strangers, in the payments of checks presented by them, to demand at least an identification.

Redington v. Woods, 45 Cal. 406 (13 Am. Rep. 190), announces the rule that the drawee of a check is bound, at his peril, to know the handwriting of the drawer, and that, if he pay a check in which the signature of the drawer had been forged, he must suffer the loss as between himself and the drawer or an innocent holder to whom he has made payment. That was the case of a raised check, and is not pertinent to the discussion of the case at bar. *Levy v. Bank of the United States*, 4 Dall. 234, does not seem to us to be in point. *National Park Bank v. Ninth National Bank*, 46 N. Y. 77, is simply an announcement of the general rule, relying upon the case of *Price v. Neal*, *supra*. *Germania Bank v. Boutell*, 60 Minn. 189 (62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519), which is asserted by the respondent to be a case in point, it seems to us is not in point, so far as the circumstances of the two cases are concerned, for there the paying bank took the precaution, which the court says any prudent bank would take, to have the payee identified and the check indorsed by a

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

responsible person. It is the allegation of the complaint in this case that the failure of the respondent to have the payee identified was an act of imprudence and negligence, and the case cited sustains this contention, in asserting that any prudent bank would have taken that precaution. So, with all the cases we have been able to find, there are none that have gone so far as to hold that, where the paying bank had been guilty of such negligence as failing to have the payee identified, or failing to make any inquiries in regard to the genuineness of the check, when presented by an absolute stranger, it could retain moneys which had been paid by the drawee bank through an inadvertence or mistake in failing to detect the forgery of the depositor's signature.

But the authorities affirmatively sustaining the exception to the general rule speak with no uncertain sound. In *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628 (64 Am. Dec. 610), the court, after mentioning the general rule, holds:

“But this exception does not apply when, either by express agreement or a settled course of business between the parties, or by a general custom in the place and applicable to the business in which both parties are engaged, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud, and, by his negligent failure to perform it, has contributed to induce the payee to act upon the paper as genuine, and to advance the money upon it.”

The exception spoken of by the court there was the exception to the rule that money paid under a mistake of facts and without consideration may, as a general rule, be recovered back. In this case the respondent did not exercise the material precaution to prevent the fraud which the court, in *Germania Bank v. Boutell, supra*, said that any prudent bank would exercise. “Nor,” said the court in

Ellis v. Ohio Life Ins. & Trust Co., "does it apply in any case where the parties are in a mutual fault, or where the money is paid upon a mistake of facts, in respect to which both were bound to inquire."

In *National Bank of North America v. Bangs*, 106 Mass. 441 (8 Am. Rep. 349), it was held that the responsibility of a drawee, who pays a forged check, for the genuineness of the forged signature, is absolute only in favor of one who has not by his own fault or negligence contributed to the success of the fraud or to mislead the drawee; and if the payee took the check, drawn payable to his order, from a stranger or other third person, without inquiry, although in good faith and for value, and gave it currency and credit by indorsing it before receiving payment of it, the drawee may recover back the money paid. The court cited *Price v. Neal, supra*, in support of the general doctrine therein declared, but stated:

"But this responsibility, based upon presumption alone, is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made;"

citing *Gloucester Bank v. Salem Bank*, 17 Mass. 33, to the effect that, if the loss can be traced to the fault or negligence of either party, it shall be fixed upon him.

The confusion which has crept into the decisions of the courts is based upon the fact that the responsibility is an absolute responsibility, instead of a presumption of negligence which may be overcome. If this doctrine is carried to its legitimate conclusion, a case might arise where the forger was so skillful that no expert would be able to detect it, and yet the paying bank might, under circumstances showing indisputable negligence and carelessness in the purchasing of such check, shift the loss which its negligence brought upon it onto an innocent party, upon

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

the theory that the rule was iron-clad and absolute, instead of being a presumption alone. In *Third National Bank v. Allen*, 59 Mo. 312, a bank, having paid to a stranger a check drawn upon a sister bank, collected from the latter the amount of the check. The paper turned out to have been forged, and, at the time of the payment, neither bank was aware of, or had reason to suspect, the fact. Next day the paying bank ascertained the forgery, and on that day or the succeeding day notified the other bank of the fact. It was held that the notification was given in reasonable time, and that the money could be recovered back. In *People's Bank v. Franklin Bank*, 88 Tenn. 299 (12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884), it was held that where a bank had negligently cashed a forged check purporting to be drawn upon another bank, and had, upon its indorsement of that check, received payment of the drawee bank, it was liable to the latter bank for the amount received, upon subsequent discovery that the check was forged. In that case the defendant answered, admitting that it received and cashed the check, and stating that it was unable to furnish the name of the party or parties by whom the check had been presented and to whom it had been paid; presumed that it required identification, but of this it was not certain. In the discussion of the case it was said:

“Notwithstanding some conflict of authority upon the subject, a careful investigation of the adjudged cases and of the text books leads us to the conclusion that the bank can recover of a party to whom payment is made on a forged check indorsed by the party to whom paid, where the party to whom paid has been guilty of negligence in receiving and indorsing the check.”

First National Bank of Danvers v. First National Bank of Salem, 151 Mass. 280 (24 N. E. 44, 21 Am. St. Rep.

450), seems to be a case directly in point. There a forged check, purporting to be drawn upon a bank by a firm which was one of its customers, was made payable to a payee named, or bearer. Another bank, of which the firm was not a customer, when the check was presented to it by an unknown person, without attempting to identify him, and upon his indorsing it in the payee's name, cashed it, and was credited with the amount as money by the drawee. The drawee negligently failed to discover the forgery for a month or two, but then immediately notified the bank cashing the check, which was not prejudiced by the delay. *Held*, that the bank cashing the check must bear the loss. The opinion in this case is written by Devens, Judge, who, after noticing the general rule which we have discussed, said :

"This presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud, or the mistake of fact under which the payment has been made. In the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual security against fraud."

"The bank is bound to know the signature of its depositor, and if it pays out money on a forged check it cannot charge the depositor with the amount, but as against him must bear the loss itself. Where, however, the loss can be traced to the fault or negligence of the drawer (or holder) it will be fixed upon him." 3 Am. & Eng. Enc. Law, 222, 223.

"But, on the other hand, it may be observed, that the holder who obtained payment cannot be considered as having altogether shown sufficient circumspection; he might,

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument, even of the drawer or indorsers themselves; and if he thought fit to rely on the bare representation of the party from whom he took it, there is no reason that he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when by an *immediate* notice of the forgery he is enabled to proceed against all other parties precisely the same as if the payment had not been made, and, consequently, the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems that of late, upon questions of this nature, these latter considerations have influenced the court in determining whether or not the money shall be recoverable back; and it will be found, on examining the older cases, that there were facts affording a distinction, and that upon attempting to reconcile they are not so contradictory as might, on first view, have been supposed." Chitty, Bills, p. 481.

2 Daniel on Negotiable Instruments, § 1657, p. 686, under the title, "Exceptions to the Rule Holding Bank Responsible When It Pays Forged Checks," says:

"Even where the general doctrine, that the bank has no remedy where it has certified or paid a forged check against the holder, is recognized as a fixed principle of law, there are some exceptions which are insisted upon as reasonable and just. As the responsibility of the bank is based upon the presumption that it has greater means and better opportunities to become familiar with the handwriting of depositors than are afforded the holder, it is declared to be decisive alone when the party holding the check has in no way contributed to the success of the fraud. And if the loss can be traced to the fault or negligence of any party it will be fixed upon him. In the absence of actual fault or negligence on the part of the drawee bank, its constructive fault in not knowing the signature of the drawer, and detecting the forgery, will not preclude its recovering back

the amount, or recalling its certificate, as against one who has received the money, or taken the check with knowledge of the forgery; or who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the bank, or to induce payment or certification of the check, without the usual scrutiny or precautions against mistake or fraud."

Mr. Morse, in his work on Banks and Banking (3d ed.), § 464, under the title, "The Old Rule Unreasonable," says:

"The old doctrine was that a bank was bound to know its correspondent's signature. A drawee could not recover money paid upon a forgery of the drawer's name, because, it was said, the drawee was negligent not to know the forgery, and it must bear the consequences of its negligence. This doctrine is fast fading into the misty past, where it belongs. . . . for it was founded in misconception of the fundamental principles of law and common sense."

In § 466 the same author says:

"But it follows obviously that if the payee, holder or presenter of the forged paper has himself been in default, if he has himself been guilty of negligence *prior* to that of the banker, or if by any act of his own he has at all *contributed* to induce the banker's negligence, then he may lose his right to cast the loss upon the banker."

Many of the cases go so far as to hold that the indorsement of a check by a purchasing bank is a warranty of the genuineness of the check, and that the drawee bank can recover back the money paid on such check. We are not able, however, to say that such is the weight of authority; but the overwhelming weight of, if not universal, authority undoubtedly sustains the right of the drawee bank to recover back money paid upon a forged check under the circumstances shown by the allegations of the complaint in this case.

Dec. 1902.]Opinion Per Curiam.

The judgment will be reversed, with instructions to overrule the demurrer to the complaint.

REAVIS, C. J., and ANDERS and MOUNT, JJ., concur.

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[No. 4399. Decided December 22, 1902.]

F. E. LANGFORD, *Administrator, Appellant*, v. ALONZO M. MURPHEY *et al., Defendants.* JOHN L. WILSON, *Respondent.*

ACTIONS — WANT OF PROSECUTION — DISMISSAL.

The dismissal of an action which had been pending for seven years without action upon defendant's demurrer to the complaint would not be an abuse of the court's discretion; nor would the fact that the statute permits a defendant the right to bring a case on for hearing deprive the court of its power to clear its docket of stale actions.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Affirmed.

Happy & Hindman, for appellant.

F. T. Post, C. R. Voorhees and Reese H. Voorhees, for respondent.

PER CURIAM.—The original suit was brought on the 31st of December, 1891, but was not tried until July 6, 1893, and judgment was obtained March 10, 1894, over two years from the beginning of the suit. To this suit respondent was not made a party. On January 3, 1895, suit was brought to subject the respondent personally to the judgment in the original proceeding. The respondent demurred to the complaint on the 8th of May, 1895, and the appellant noticed the demurrer for hearing for the 13th

of May, 1895. The demurrer was not passed upon, and nothing whatever was done in the case until March 4, 1902, when the appellant moved to strike said demurrer from the files. On March 19, 1902, the respondent moved to dismiss the case for want of prosecution, which motion was granted, and judgment of dismissal entered. From said judgment this appeal is taken.

It will thus be seen that in addition to the slow prosecution of the case before the original judgment was obtained, there was a virtual abandonment of the action from the 8th of May, 1895, until March 4, 1902. The discretion of the court in dismissing this action, under the circumstances shown by the record, cannot be questioned, nor do we think that the fact that the statute permits the defendant to bring a case on to hearing deprives the court of its unquestioned common-law, if not inherent, power to clear its dockets of abandoned or stale actions.

The judgment is affirmed.

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[No. 4318. Decided December 23, 1902.]

JAMES J. RALPH, *Respondent*, v. AMERICAN BRIDGE COMPANY OF NEW YORK, *Appellant*.

MASTER AND SERVANT — SAFE APPLIANCES FOR WORK — DEFECTIVE LADDER.

The rule requiring the master to exercise reasonable care in providing the servant with reasonably safe appliances affords a right of recovery to a workman injured by reason of the defective condition of a beam made into a ladder by means of cleats nailed across it, and used by the foreman and workmen as a ladder in the construction of a high, steel-frame building, since the very necessities of work upon such a structure would impose the duty upon the master of furnishing adequate ladders.

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

SAME — NEGLIGENCE — PROXIMATE CAUSE — CONCURRING ACTS OF MASTER AND FELLOW SERVANT.

Even if the negligence of a fellow servant in constructing and adjusting the ladder concurred with that of the master in failing to supply a suitable ladder, it would not excuse the primary negligence of the master for injury to another of his servants.

SAME — NEGLIGENCE OF THIRD PARTIES — INSTRUCTIONS.

In an action against the contractor for the steel frame work of a building to recover for injuries received by reason of having been compelled to use a defective ladder, in which the defense was interposed that the ladder was made insecure through the prior acts of stone masons employed in connection with the building, an instruction is not misleading as localizing the position of the masons at the bottom of the work, when it charges the jury that if at the time plaintiff was injured certain stone masons were employed near the foot of the ladder in question, and if the plaintiff was injured on account of any act of theirs and not by negligent acts on the part of defendant, plaintiff could not recover.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Affirmed.

R. S. Eskridge, James Hamilton Lewis, Thomas B. Hardin and Leroy V. Newcomb, for appellant.

Fred H. Peterson, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Action for personal injuries. The defendant is a corporation engaged in the construction of buildings, and was erecting the steel frame-work of a large building on Post street in Seattle. Plaintiff was employed by defendant in and about the erection of said steel structure, and his duties required him to work throughout the building. The maximum height of the structure was 80 feet. The large steel columns were raised with a derrick, and then pushed into place at the top with wooden beams four by six inches, and, when erected, stayed in place by such beams. One of the steel columns, which was

80 feet in height, had been erected, and was stayed by one of the wooden beams. The beam was placed at the bottom of one column, and then at an incline of about 60 degrees against the column it stayed. The column was also wedged at the top to keep it in a perpendicular position. This particular beam had been sawed off by one of the workmen, and was too short by about 18 inches, but, in order to make it available, was drawn away from the foot of the column at the bottom and a short piece of timber about 18 inches long put in between the beam and the foot of the column, where it was secured. This beam was about 16 or 18 feet long, and in this way used as a stay for the steel column, when cleats about 18 inches long were nailed upon the beam, and thereafter it was generally used by all the workmen about the building, including the foreman of defendant, who had occasion to go up and down from the top of the structure to the basement. It had been in regular use as such ladder for about two months, when the plaintiff was directed by the assistant foreman of defendant to go to the top of the structure on an errand. Plaintiff went up from the basement. He started up on the cleats nailed on the beam, and, when about two-thirds of the way up on this ladder, it turned over and dropped about four feet, and the plaintiff fell to the basement of the building, sustaining the injuries for which he claims damages. The complaint alleged that a Mr. Grimm was defendant's foreman in complete charge of the erection of the steel frame structure, and that the wooden beam used as a ladder was erected by defendant for the use of all its workmen. It charges negligence as follows:

"That through the negligence and carelessness of the agents and servants of said defendants, and particularly through the carelessness of said Grimm as such foreman and superintendent, without any knowledge thereof on the

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

part of said plaintiff, the said timber was permitted to become loose and unfastened, and that when said plaintiff, in the usual course of his employment, attempted to go from the first to the second story of said building, and going by way of said timber, and upon the aforesaid cleats, the said timber, by reason of its not being properly fastened and having become loose as aforesaid, canted and rolled over, and said plaintiff was thereby precipitated upon the iron beam of the first story of said building, a distance of about fifteen feet, and then was thrown into the basement of said building a further distance of about fifteen feet, or in all a distance of 30 feet."

The answer admits the employment of plaintiff, and that Grimm was in charge of the construction for defendant; admits the erection of the wooden beam, and its use by all the workmen as alleged in the complaint. For affirmative defense the answer alleges:

"That the nature, character, and position of the ladder referred to in plaintiff's complaint were open and apparent to plaintiff at all times, and that all damages and risks incident to the use thereof were assumed by him.

"That at the time and place of said accident, said plaintiff carelessly and negligently stepped upon and attempted to climb said ladder, and carelessly and negligently loosened the same so that it turned, and carelessly and negligently fell therefrom; and defendant avers that the injuries, if any, sustained by plaintiff, were caused and contributed to by his own careless and negligent acts."

1. There is no substantial conflict in the evidence as to all the material facts. It appears that plaintiff and his fellow workmen all engaged in raising and placing the steel columns, and also in bracing and staying them, as mentioned, with the wooden beams such as the one from which plaintiff fell, though it seems plaintiff was not engaged about or with any one in placing this particular beam as a stay, and had no knowledge that it was short and

braced at the bottom by another piece of timber. It does not appear from the evidence of plaintiff who fastened the cleats to the wooden beam. However, it does from that of defendant, which shows that defendant's time-keeper, and another workman employed in the same capacity as plaintiff, and the inspector of the structure, who was in the employ of the owner of the buildings, nailed the cleats to the beam which caused it to be used as a ladder. There was some evidence on the part of defendant tending to show that some stone masons were also working around the structure; that such masons were in the employ of the contractor doing the masonry work; and that these masons put a rope around the steel column at its top, and in the course of their work loosened the wedges which were used to hold the top of the column in place. It was also shown that a fellow workman of plaintiff, some twenty or thirty minutes before the accident, observed the timber heretofore mentioned as holding the bottom of the beam in place was loosened, and this workman was looking for the foreman, Grimm, to inform him of the insecurity of the beam, when the accident occurred, and before he found the foreman. The foreman was familiar with the ladder, knew of its general use, and himself used it. Defendant was, during all the times mentioned, a contractor for the erection of the steel frame work of the building.

2. The first error assigned is that the court should have taken the case from the jury because of the insufficiency of the evidence to show any negligence on the part of defendant. Counsel for defendant urge, as there is no substantial conflict in the evidence, the verdict should have been directed by the court. We think the determination of this question is virtually the decision of the case. The main ground urged against the verdict is that the ladder mentioned was erected by the fellow servants of plaintiff, and that it was

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

an incident to their work; that the defendant owed no duty to plaintiff as the ladder was not an appliance which the master was required to furnish. It is insisted the rule, "the master must exercise reasonable care in providing the servant with a place and appliances reasonably safe," is not applicable to the facts in this case, and with much industry and diligence counsel have referred to and reviewed many authorities which it is claimed support their contention. Some of these, which illustrate the discussion, are mentioned here. *Butler v. Townsend*, 126 N. Y. 105 (26 N. E. 1017), was where an accident occurred from defective staging erected in repairing a ship. There were two sets of contractors at work, one called "lumpers" and the other "caulkers." It was the duty of the former to erect a staging, and the caulkers thereafter used it. It was held, first, that the lumpers were not agents of the defendants, the owners of the ship, and hence the owners were not liable for the injury occasioned by the defective scaffolding to one of the caulkers. The court also held that the staging was not a *place*, but was an appliance to be furnished by the caulkers themselves; and that the injured caulkers was a fellow servant of the lumpers, for all were engaged in the same general work,—the repair of the ship. In *Lindvall v. Woods*, 41 Minn. 212 (42 N. W. 1020, 4 L. R. A. 793), the case was a trestle erected by railway workmen, and it was held that all the men working in the construction of such structure were fellow servants. In these cases, and in others of those cited by appellant, the rule announced in the classification of fellow servants is not in harmony with the uniform decisions of this court. We have frequently stated and approved the principle that the duty of the master to provide a reasonably safe place and reasonably safe appliances for his servant is personal, and, whether this duty is performed by the principal or by his

Opinion of the Court.—REAVIS, C. J. [30 Wash.

agent, whoever that agent may be and in whatever capacity he may generally be employed, the duty is still that of the principal. It is also well settled that, if the negligence of a fellow servant concur with the negligence of the master, it does not excuse the primary negligence of the master for injury to another fellow servant. The present case may be distinguished from a class of cases which have frequently arisen where temporary staging is used by workmen as a part of the details of their ordinary work and erected from time to time by themselves. The mason or carpenter who, in common with his fellows in the same occupation, erects scaffolding, or carries a ladder for such use, which he furnished himself, assumes the risk of his work in the safety of such scaffold or ladder. But here there was a large, steel-frame structure in process of construction, which obviously required many appliances for the workmen; among those, ways to go from the basement to the top of this tall building. Under such circumstances, and in view of the conditions shown in the evidence, the duty of supervision and inspection of such necessary appliances was imposed upon the defendant. There are some pertinent and well considered cases which maintain this view of the duty imposed on the defendant. In *McBeath v. Rawle*, 93 Ill. App. 212, it was observed:

"The evidence is sufficient to establish that the scaffold in question was insecure by reason of a defective scantling used as one of the supports, and that the defect, viz., a knot which weakened the scantling, was apparent upon the surface of the scantling and could have been detected by inspection. Counsel for appellants contend that there can be no liability imposed upon appellants by reason of the defective condition of the scaffold, because the scaffold was furnished by the brick-mason contractor and not by appellants. We are of opinion that this contention can not be sustained. The scaffold was in fact used by appellants, and

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

in that use they in effect furnished it to their employees to go upon. The fact that the brick mason, in pursuance of established custom, built it and furnished and maintained it, goes only to the manner in which appellants acquired the scaffold. While appellants used it in their business they furnished it to their employees, and it matters not at all whether they built it themselves or got it by gift of another, or through right of established custom. By whatever means they acquired it, they were in any event bound to the duty imposed upon them by the law to exercise a reasonable degree of care in the furnishing of it as a place for their employees to work. *C. B. & Q. R. R. Co. v. Avery*, 109 Ill. 314; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Wis. Cent. R. R. Co. v. Ross*, 142 Ill. 9; *Hess v. Rosenthal*, 160 Ill. 621; *C. & A. R. R. v. Maroney*, 170 Ill. 520; *C. & A. R. R. v. Scanlan*, 170 Ill. 106; *Rice v. Paulsen*, 51 Ill. App. 123; *East St. Louis, I. & C. S. Co. v. Crow*, 52 Ill. App. 573."

The case of *Chicago & A. R. R. Co. v. Maroney*, 170 Ill. 520 (48 N. E. 953, 62 Am. St. Rep. 396), is directly in point on nearly all the material questions raised here. See, also, *Beattie v. Edge Moor Bridge Works*, 109 Fed. 233; *Mills v. Maine Ice Co.*, 51 N. J. Law 342 (17 Atl. 695); *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. Law, 647 (44 Atl. 762).

3. From the foregoing discussion and the conclusion on the ruling of the court in submitting the case to the jury, it seems unnecessary to review in detail the errors assigned on the instructions. The court gave the following instruction on the evidence referring to the action of the stone masons:

"I instruct you, also, gentlemen of the jury, that if you believe that at the time the plaintiff was injured certain stone masons were employed near the foot of the ladder in question, and if you further believe from the evidence that on account of the act on the part of such stone masons, if any such persons did exist, the plaintiff was injured; and

Syllabus.

[30 Wash.]

not injured, gentlemen, by negligent acts on the part of the defendant company, then I instruct you, gentlemen of the jury, that the plaintiff would have no right to be compensated at the expense of the defendant in this case, because the defendant in this case is being sued as for the acts and the wrongful acts of itself and its own agents, and not on account of the acts of other persons, or the agents of other persons."

The instruction does not seem to bear the injurious construction inferred by counsel. It does not emphasize the position at the bottom where the masons were working, so as to impress or mislead the jury. The principle announced is correct, if the injury occurred directly from the acts of the masons, and the defendant's negligence did not concur therein. But there was evidence, as we have seen, tending to show a defective or insecure condition in placing the wooden beam used as a ladder at the foot of the column which secured it for a considerable time, and inhering in it until the fall. It is sufficient to observe generally that the instructions seem to very clearly and concisely apply the correct legal principles controlling the case, and are well adapted to the comprehension of the jury.

Affirmed.

DUNBAR, MOUNT, ANDERS and FULLERTON, JJ., concur.

[No. 4858. Decided December 23, 1902.]

30	508
37	228
38	508
40	543
30	508
42	186

JANET BELL, *Respondent*, v. CITY OF SPOKANE, *Appellant*.

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK — ACTION FOR INJURIES — EVIDENCE.

The admission of evidence of the defective condition of a sidewalk after an accident was not prejudicial error, when the evi-

Dec. 1902.]Syllabus.

dence was merely cumulative of testimony describing the walk at the time of the accident.

SAME.

Where the question of notice to the city of the defective condition of a sidewalk is contested, testimony showing its condition both before and after the accident is admissible for the purpose of establishing knowledge of the defect on the city's part.

SAME — CLAIM FOR INJURIES — MISTAKE IN DATE — CORRECTION BY PAROL.

A claim for damages filed by an injured party with the city council in accordance with the requirements of the city charter is admissible in evidence, though the jurat attached thereto apparently indicates it was sworn to on the day prior to the injury, if it appears by parol testimony that the date was erroneous and that the claim was actually made out and sworn to after the accident and filed within the period prescribed by the charter for the presentation of such claims.

INSTRUCTIONS — CONSTRUCTION AS A WHOLE.

A detached portion of an instruction will not be held as erroneous, where its meaning, when taken in connection with the balance of the instruction, is clearly shown to be unobjectionable.

VARIANCE.

In an action for injuries caused by a defective sidewalk, there is no variance between the claim filed with the city council and the proofs adduced on the trial, by reason of the fact that plaintiff testified she received the injuries complained of by having her foot caught between two planks, while the claim described the injuries as caused by her feet catching and stumbling over, upon, and against the nails projecting from the planks of the walk, and by reason of said planks having become loose, warped, decayed and shaky, whereby they bent and sank beneath the weight of one stepping upon them.

Appeal from Superior Court, Spokane County.—Hon. FRANK H. RUDKIN, Judge. Affirmed.

A. H. Kenyon and John P. Judson, for appellant.

E. H. Belden, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal from a judgment for damages for personal injuries alleged to have been sustained by respondent upon one of the public streets of the city of Spokane. The first assignment is that the court erred in permitting the witnesses Louis Mondt and L. C. Mondt to testify to repairs made by them and the condition of the sidewalk, where the accident occurred, a considerable time after the occurrence. An examination of the testimony of these witnesses reveals the fact that it was intended to, and did, show the condition of the walk prior to and subsequent to the time of the accident, and was intended to show the means of witnesses' knowledge of the condition of the walk at the time of the accident. It shows that for a long period before the alleged accident, and until a considerable period after the accident, the walk was in the same condition as it was at the time of the accident; that the planks were loose, and the stringers decayed; and that the walk was in a very dilapidated and dangerous condition. This testimony would have been admissible, in any event, to show notice to the city. It is contended by the appellant that notice was admitted, and that the city relied upon having repaired the street; but the record shows that the question of notice was contested, and that testimony tending to show notice was strenuously objected to. In any event, the testimony was cumulative, and, under the state of facts shown by the record, was absolutely harmless, so far as the appellant's interests are concerned. It was decided by this court in *Elster v. Seattle*, 18 Wash. 304 (51 Pac. 394), that the admission of evidence of the condition of a sidewalk after the accident was not prejudicial error, when the evidence was simply cumulative of testimony describing the walk at the time of the accident. In that case it was said:

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

"The first objection is as to the admission of the testimony of witness Hines, who testified to the condition of the walk a week or ten days after the accident occurred. This, in any event, was only cumulative evidence, and could not have been prejudicial, from the fact that he described the condition of the sidewalk the same as it was described by the other witnesses who saw the walk at or about the time of the accident."

There was no error in admitting the testimony.

The second assignment is that the court erred in admitting in evidence, over the objection of defendant, plaintiff's claim of damages; and the fourth, that the court erred in giving instruction, which is as follows:

"If you believe from the evidence that the claim which had been offered in evidence by the plaintiff was in fact filed with the city council within one month after the happening of the alleged accident, and that the same was in fact subscribed by the plaintiff, and that the affidavit of its truth was in fact subscribed and sworn to by said plaintiff after the happening of said alleged accident and prior to the filing thereof, then I charge you as a matter of law that such claim is a sufficient claim under the provisions of the charter of the city of Spokane to prevent any waiver of the plaintiff's claim, if any she had."

These two assignments will be considered together. The accident occurred on the 8th of August, 1901. It appeared by the jurat that the claim was sworn to by the respondent on the 7th of August, 1901, and proof was introduced, by the testimony of the respondent and of the notary who administered the oath, that the claim was actually sworn to on the 7th day of September, 1901. That is the basis of the objection here presented. We think the court committed no error in admitting the testimony or in giving the instruction complained of. The jurat is not a part of the affidavit. A date is not essential to an affidavit, and, if a mistake has been made in the date, it is

competent to show it by parol testimony. 1 Enc. Pl. & Pr., p. 320, and cases cited. It must have been apparent to the city council who passed upon this claim, if, indeed, they noticed the date at all, that the insertion of the 7th of August instead of the 7th of September was purely a clerical error, and could in no way affect their deliberations on the subject of the damages claimed, or their determination in regard thereto. The charter provision is essentially one of notice, and was probably intended to enable cities to repair defective sidewalks, and thereby prevent further liability, to give them an opportunity to settle the claim without the expense of a law suit, and also an opportunity to obtain and preserve testimony in relation to the condition of the street, and the circumstances surrounding the accident; and was not intended as a stumbling block or a pitfall to prevent recovery by meritorious claimants. We think, as the court indicated, that if it appeared in the trial of the cause that the claim was actually made and sworn to and presented within the time prescribed by the charter, and was sufficient in other respects, the object of the charter provision has been accomplished. There was no error in denying defendant's motion for a nonsuit, as there was ample testimony to sustain the verdict. The instructions asked for and refused, which refusal the appellant assigns as error, were substantially given by the court in other instructions, though not in such evidentiary detail as is set out in the instructions asked.

The seventh assignment is that the court erred in giving to the jury of its own motion the following instruction:

"Of course, you cannot measure in dollars and cents the exact amount which she is entitled to recover, but it is for you to say, in the exercise of a sound discretion, from all the facts in the case, after considering and weighing all the

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

testimony in the case, without fear and without favor, without passion and without prejudice, what amount of money will reasonably compensate her for the damage and injury which she has suffered."

It is insisted that in this instruction the court virtually told the jury that the plaintiff was entitled to recover something, that the least that can be said is that the court expressed its opinion that the plaintiff was entitled to recover on the evidence, and that it was in violation of the constitutional provision prohibiting the court from in any manner expressing any opinion or commenting on the evidence, either directly or indirectly. No proper error can be assigned on a detached portion of an instruction, and, when the whole instruction on the subject criticized is read, it is shown very plainly that no error was committed. The instruction complained of commenced as follows: "If you find, under the instructions already given, gentlemen of the jury, that the plaintiff is entitled to recover in this action, the amount of the recovery is for you to determine from all the facts in the case;" and the jury, without any doubt, understood that the clause quoted by the appellant must have reference to the subjunctive clause in the first part of the instruction. If the jury could not understand this, it would be idle to instruct the jury at all. The instructions of the court as a whole,—both those offered by the court on its own motion, and those given at the request of the appellant,—were much more favorable to the appellant than the ordinary instructions on subjects of this character, and the appellant has no legal ground to complain of the same.

The third assignment of error, that the court erred in denying defendant's motion for a nonsuit by reason of a variance between the claim filed and the proofs adduced, because, as alleged by appellant, the claim filed states that the

accident occurred to plaintiff by reason of her foot catching and stumbling against the nails projecting from the sidewalk, while the plaintiff testified that she caught her foot between two planks in the walk, and thus received the injuries complained of, and that the city was thereby deceived as to the character and cause of the accident, expecting the plaintiff to try to prove the walk in one condition, while it was met at the trial by an entirely new and different contention and character of evidence, can be disposed of by a reference to the claim itself, which in that particular is as follows:

“That the cause of said injuries was a fall upon said walk at the place aforesaid, by reason of my feet catching and stumbling over, upon, and against the nails projecting from the plank of said walk, and by reason of said plank or boards of said walk having become loose, warped, decayed, and shaky, and so as to permit some of said plank to weaken and lower when stepped upon, and thus sink or bend upon weight being made thereon on account of the decayed condition of the timbers running lengthwise with the said Second avenue, upon which were laid the plank or boards of said walk; that each, all, and every of said causes and defects contributed to and made said walk unsafe and dangerous, and each, all, and every of said defects contributed to and caused the injuries herein mentioned.”

The cause was tried without error, and the judgment will be affirmed.

REAVIS, C. J., and MOUNT, ANDERS and FULLERTON, JJ., concur.

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

[No. 4882. Decided December 28, 1902.]

J. C. FOSTER, *Respondent*, v. PACIFIC CLIPPER LINE, *Appellant*.

EVIDENCE — ADMISSIBILITY OF UNSTAMPED INSTRUMENT.

The absence of an internal revenue stamp would not affect the admissibility of the instrument as evidence in an action in a state court.

WHARFINGERS — COLLAPSE OF WHARF — PRESUMPTION OF NEGLIGENCE.

Where no external violence is shown as the cause of the collapse of a dock and warehouse, a presumption of negligence on the part of the warehouseman is raised.

SAME — INSTRUCTIONS — BURDEN OF PROOF.

An instruction to the effect that, if the facts raised a presumption of negligence on the part of defendant, who had set up an affirmative defense of the exercise of due care, then the burden of removing the presumption was on defendant, and the jury should find for plaintiff, if the evidence should be evenly balanced, was correct.

INSTRUCTIONS — REFUSAL OF REQUESTS.

The refusal of requested instructions is not error when the same ground has been covered by the court in other instructions.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Affirmed.

Charles F. Munday, for appellant.

William Parmerlee and J. L. Corrigan, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—The complaint, in substance, alleges that the defendant was a common carrier of goods for hire between Seattle and San Francisco; that, about November, 1899, plaintiff delivered to defendant, for transportation by boat from Seattle to San Francisco, 1,872 sacks of oats, the plaintiff then having special interest in said oats by vir-

tue of a chattel mortgage owned by him, amounting to the full value of the oats; that the defendant undertook to safely transport said goods. The allegation of loss is as follows:

“That the defendant did not safely carry or deliver said goods, or any part thereof, but, on the contrary, the defendant negligently failed to carry said goods, or any part thereof, and negligently lost all thereof, except an amount of the reasonable value of twenty-five dollars (\$25.00) which amount the defendant converted to its own use; all to the damage of the plaintiff in the sum of two thousand and forty and 94.100 dollars (\$2,040.94).”

The answer admits the receipt of the oats and their loss, and that all the charges on account of said oats had been paid. It denies that the oats were lost through any fault or neglect of defendant, and as an affirmative defense states:

“That at Seattle, Washington, at the times mentioned in said third amended complaint, and at the dates mentioned in the foregoing portions of this answer, the defendant was carrying on in the city of Seattle the business of a forwarder, warehouseman, and wharfinger; that on said dates specified in the foregoing portions of this answer there was delivered to the defendant, in its capacity as a forwarder, warehouseman, and wharfinger, eighteen hundred and seventy-two sacks (1,872) of oats (being the same oats referred to in the third amended complaint herein), to be stored by the defendant in its warehouse, and to be forwarded by said defendant to San Francisco, California, according to directions given at the time of the delivery of said oats to the defendant; that said oats were thereupon stored by the defendant in its warehouse on its wharf or dock, commonly known as the ‘Arlington dock,’ in the city of Seattle, to await the arrival of the steamer upon which said oats were to be forwarded according to the directions given as aforesaid; that said oats remained in the possession of said defendant in its said capacity of forwarder,

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

warehouseman, and wharfinger, and in its said warehouse, until the 8th day of December, 1899, when, through no fault or negligence on the part of the defendant, but by accident or casualty, which could not, by reasonable prudence or care, be provided against, said wharf upon which and said warehouse in which said oats were stored broke through, and precipitated said oats into the waters of Elliott's Bay, underneath said warehouse and dock, whereby said oats became and were lost, so that defendant became, and still is, unable to deliver the same; that said defendant at all times, in the handling of said oats and in the storing of the same in the warehouse on said dock, and in all things and at all times while said oats were in its custody and possession, exercised all proper care and caution, and was not in any respect guilty of any negligence or want of care; that the building in which and the dock upon which said oats were stored were at all times reasonably fit and safe for such storage, and the defect therein, if any there was, which caused the falling in thereof, was one which the defendant did not know of, and could not have discovered by the use of ordinary care."

The first error assigned is on the admission of the chattel mortgage in evidence, because it did not have an internal revenue stamp thereon. It may be observed that such stamps are not material in the procedure in the state courts. *Dawson v. McCarty*, 21 Wash. 314 (57 Pac. 816, 75 Am. St. Rep. 841).

The second and third errors are assigned upon the instructions. It appears from the record that no point was made by defendant on the allegation in the complaint charging defendant as a common carrier. The material instructions given were as follows:

"I instruct you, gentlemen of the jury, that the issues that you have for your consideration in this case, summarized, are whether or not the defendant, in its capacity as wharfinger, warehouseman, and forwarder, is liable for negligence as for the loss of the plaintiff's oats. The ques-

tion whether or not the defendant company is a carrier of goods, as alleged in the complaint, is not before you for your consideration in this case, on account of the manner in which the proof has gone before you. . . .

"I instruct you that a warehouseman is one who receives into a warehouse, for storage, goods, in consideration of hire or money paid for that service."

The court correctly defined "ordinary care" and "negligence." In substance, the jury were instructed that if they believed from a preponderance of the evidence that the dock in question collapsed, and that the collapse occurred, considering the plaintiff's case alone, not by reason of any extraordinary violence, or not by reason of any cause outside the dock itself, negligence of the defendant was presumed; and, continuing further, the court said:

"I instruct you, however, gentlemen of the jury, that a presumption of that kind is not conclusive at all, but that if you should consider the plaintiff's case with reference to the last instruction that I have given you, and should come to the conclusion that negligence had been shown by a presumption of that kind, then it would be your duty to consider the defense alleged on the part of the defendant, with reference to the use of due care; and the law at that stage would then cast upon the defendant the burden of proving by a fair preponderance of the evidence that the collapse of the dock had occurred in spite of the use of due and ordinary care on the part of the defendant, or that the collapse had occurred by reason of some agency or cause for which the defendant was not to blame at the time. . . .

"I instruct you that negligence will not be presumed from the mere fact of the loss of the oats, but the fact of negligence must be shown by plaintiff, by a fair preponderance of the evidence, under the rules and in accordance with the instructions that I have heretofore given you."

The court then gave the first instruction complained of here as follows:

"I have already instructed you that the burden of proof

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

is upon the plaintiff to establish the allegations of the complaint, that is, the negligence and the loss. If in the consideration of the evidence that has been introduced upon such an issue as that, should you find the evidence to be evenly balanced, it would be your duty to resolve that point in favor of the defendant. So, too, where the burden of proof should be upon the defendant, as relating to the affirmative defense that he alleges, should you find that all the evidence was evenly balanced in favor of the plaintiff and the defendant upon any such issue, where the burden lay upon the defendant, it would be your duty to resolve such issue in favor of the plaintiff."

It seems clear the court meant, by the reference to when the burden should shift to the defendant, that, if the facts in the plaintiff's evidence raising the presumption as defined were found, then the burden of removing such presumption was on the defendant. The accident which occasioned the loss of the oats was the collapse of its wharf in Seattle. There had been evidence given on behalf of the plaintiff tending to show some defects in the wharf existing prior to the accident. The style of the construction of the wharf upon piles was shown, and the evidence tended to show that it was not sufficient to maintain the weight imposed upon it. A considerable portion of the wharf, stated as forty feet square, or more, had fallen. It seems, there was sufficient evidence on the part of the plaintiff for the jury to infer that the dock was insufficient in strength to support the weight imposed upon it when the oats were placed there. If this be true, the instruction relative to the presumption of negligence, and the burden upon the defendant to meet it, taken together with the other instructions, stated the law fairly. It would seem that the nature of the accident may raise the presumption of negligence under some circumstances. See *Holt Ice, etc., Co.*

v. Arthur Jordan Co., 25 Ind. App. 314 (57 N. E. 575); *Davis v. Tribune Job Printing Co.*, 70 Minn. 95 (72 N. W. 808); *Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121.

In *Kaiser v. Latimer*, 57 N. Y. Supp. 833, the principle of the case is very well asserted in the syllabus that "The negligence of a warehouseman will be presumed where the goods were destroyed by the collapse, from no external violence, of the building in which he stored them."

The second error claimed was the refusal of the court to instruct at the request of defendant that, if the jury were unable to determine from the evidence what caused the dock to break through, they must find for the defendant. In view of the instructions already given, no error is perceived in the refusal to give this one.

It may be observed of the objection that the court overruled the motion for a new trial on the ground that the evidence was insufficient to sustain the verdict, that there was substantial evidence supporting all the essential facts necessary to maintain the verdict.

Affirmed.

DUNBAR, FULLERTON, ANDERS and MOUNT, JJ., concur.

80	520
88	275
30	520
338	86
338	87

[No. 4417. Decided December 28, 1902.]

L. D. SPENCER, *Appellant*, v. THE COMMERCIAL COMPANY, *Respondent*.

LANDLORD AND TENANT — WRONGFUL EVICTION — COMPLAINT — ALLEGATION OF RENT PAYMENT.

The payment of rent is not a condition precedent to the quiet enjoyment of leased premises, and therefore need not be alleged as performed in the complaint in an action for wrongful eviction.

Dec. 1902.] Opinion of the Court.—MOUNT, J.

SAME — COVENANT AGAINST SUBLETTING.

Under a covenant in a lease whereby the tenant agrees "not to sublet the whole of said premises nor assign this lease without the written consent" of the landlord, the latter is not entitled to re-enter and evict the tenant because of the fact that he sublet parts of the premises less than the whole.

SAME — FORCIBLE EVICTION — RIGHT OF LANDLORD.

The common-law right of a landlord to forcibly regain possession of leased premises has been abrogated under the statutes of this state giving a remedy upon the tenant's failure to perform the conditions of the lease, and this is so, notwithstanding an agreement permitting the landlord to take possession by force.

SAME — REMOVAL OF FIXTURES.

Where a tenant enters into a new lease, making no mention of a former lease or tenancy, and with no reservation for removal of fixtures placed under the former lease, his right to remove fixtures is thereby precluded.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

G. Ward Kemp, for appellant.

Ira Bronson and Kenneth Mackintosh, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This was an action by a tenant against his landlord for damages on account of an alleged wrongful eviction. A motion to strike certain parts of the complaint was sustained, and subsequently a general demurrer to the complaint was also sustained, and the action dismissed. This appeal is to review the rulings of the court upon these two questions.

We shall consider the ruling upon the demurrer first. The complaint alleges in substance that on the 14th day of July, 1899, defendant executed and delivered to plaintiff a written lease, thereby leasing to plaintiff for a term of three years, begining July 1, 1899, and ending July 1, 1902, a certain described warehouse at a monthly rental of

\$50; that, at the time of the execution of the said lease, plaintiff was in possession and then subletting parts of the premises to other persons; that on the 1st day of January, 1902, such sub-tenants were paying to plaintiff the sum of \$175 per month, and, but for the wrongful eviction hereinafter alleged, would have paid the said sum to the plaintiff till the expiration of the term of said lease; that on the 1st day of January, 1902, defendant notified said sub-tenants not to pay any more rent to plaintiff, but to pay the same to defendant, and that, on their failure so to do, defendant would eject them from the premises; that defendant further refused to treat with plaintiff as tenant, as provided by said lease; that on February 1, 1902, defendant further entered upon said premises and notified said sub-tenants that they must pay all rents to defendant or be ejected from the premises, and that defendant was the owner and in possession of the premises, and that plaintiff had no rights therein; that subsequently defendant cut the water pipes supplying water used by said sub-tenants, and collected the rents due plaintiff from said sub-tenants; that by the acts of defendant plaintiff was wrongfully evicted from said premises, and was thereby compelled to abandon, and did abandon, the premises, to his damage. Before the demurrer or motion was heard by the court, the defendant made a demand upon the plaintiff to produce and serve upon defendant a copy of the lease of June 14, 1901, and plaintiff thereupon served and filed a copy of the lease, the provisions of which, so far as they affect the motion and demurrer, are as follows:

“This indenture, made this 14th day of June, in the year of our Lord one thousand eight hundred and ninety-nine, between the Commercial Company, a corporation, of Seattle, Washington, the party of the first part, and L. D. Spencer, of the said city of Seattle, the party of the second

Dec. 1902.] Opinion of the Court.—MOUNT, J.

part, Witnesseth: That the said party of the first part does by these presents, lease and demise unto the said party of the second part, those certain premises now occupied by the party of the second part as a warehouse, situate upon a portion of lot 1, block 198, of the plat of the Seattle Tide Lands, in King county, state of Washington, with the appurtenances, for the term of three years from the first day of July, 1899, at the monthly rent or sum of \$50 per month, payable in lawful money of the United States of America, in advance, on the 1st day of each and every month during said term. . . . And it is hereby further agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and remove all persons therefrom; and the said party of the second part hereby covenants, promises, and agrees to pay the said party of the first part the said rent in the manner hereinbefore specified, and not to underlet the whole of said premises, nor assign this lease, without the written consent of the said party of the first part. And at the expiration of the said term the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit (damage by the elements or fire excepted)."

It is insisted that the complaint, when read in connection with the lease, discloses no cause of action, for the reason that there is no allegation of performance by the appellant of conditions precedent to his right to possession of the premises. No authority directly in point is called to our attention, but authorities are cited by respondent to the effect that, to entitle the party to recover for a breach of contract, he must allege performance on his part of the conditions precedent. This is no doubt the rule, but the question immediately arises, is the payment of rent under this lease a condition precedent to the quiet enjoyment of the premises by the appellant? A condition precedent is

Opinion of the Court.—MOUNT, J. [30 Wash.

defined by Mr. Taylor, in his work on *Landlord & Tenant* (at § 275, Vol. 1, [8th ed.]), as follows:

"Where the condition must be performed before the estate can commence, it is called a *condition precedent*; but where the effect of a condition is either to enlarge or defeat an estate already commenced, it is called a *condition subsequent*. The former avoids the estate, by not permitting it to vest until literally performed; while the non-performance of the latter defeats the estate by divesting the party of his title, and the interest already vested; because its continuance is made to depend upon the performance of the act, or the happening of the stipulated contingency."

See, also, 2 Wood, *Landlord & Tenant* (2d ed.), § 510. The lease provides that the rent shall be paid "in advance on the first day of each and every month during said term," also, "if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and remove all persons therefrom." The most that can be claimed for this provision is that the lessor reserves thereby a right or license to re-enter. The lease, according to its terms, is not necessarily terminated on failure to pay rent, but the lessor *may at his option* re-enter and thereby terminate the tenancy, or he may continue the tenancy indefinitely. The lessee had taken possession of the premises. The effect of the condition in the lease was to defeat an estate already commenced. It was clearly a condition subsequent. The payment of rent, therefore, is not a condition precedent to the quiet enjoyment of the premises, and need not be alleged in the complaint.

It is next insisted that the complaint is insufficient because, by the terms of the lease, if default is made in any of the covenants, the lessor may re-enter and remove all persons therefrom; that the complaint shows that there

Dec. 1902.] Opinion of the Court.—MOUNT, J.

has been such breach as to entitle respondent to re-enter, and that he has re-entered. The complaint shows that, at the time of the execution of the lease, plaintiff was in possession of the premises, "and was then sub-letting, and has ever since sub-let, *parts* of said premises to other persons." The lease states that the lessor (appellant) promises and agrees "not to sublet the whole of said premises nor assign this lease without the written consent" of the respondent. This is an express provision not to sublet the whole of the premises or to assign the lease without written consent. These provisions are strictly construed. 1 Taylor, Landlord & Tenant (8th ed.), § 403. The language used contains a strong implication that the tenant may sublet parts of the premises, because he is enjoined not to *sublet the whole or assign the lease*. Taken in connection with the allegation that at the time the lease was made the appellant was then subletting parts thereof, this is conclusive that the parties intended the subletting of parts less than the whole. We think that, under these circumstances, it is not shown that the respondent was entitled to re-enter and evict the appellant from possession of the premises.

If the respondent by the terms of the lease had a right to terminate the lease for either of the causes named, we cannot agree that he may take the law in his own hands and by force or strategy, as is alleged in this case, evict the tenant. There is no doubt that parties to a lease may provide for a forfeiture upon non-compliance with certain conditions. Under the common law in such cases the lessor might regain possession by force. 2 Taylor, Landlord & Tenant (8th ed.), §§ 531 and 532; 2 Wood, Landlord & Tenant (2d ed.), § 537. But this rule, which makes the landlord a law unto himself, is not conducive to good business principles or to good order, and for that

reason is not looked upon with favor. The statutes of this state (§ 5527, Bal. Code), provide a speedy, adequate, and orderly method for a landlord to obtain possession of his property upon failure of the tenant to pay rent, or upon failure to perform any other condition or covenant contained in a lease. These statutes we think should be held to provide an exclusive remedy, notwithstanding an agreement permitting possession to be taken by force.

In the case of *McClellan v. Gaston*, 18 Wash. 472 (51 Pac. 1062), which was a case where a clause in a chattel mortgage provided that, if the mortgagee should fail to make the payments as agreed, the mortgagor might take possession of the mortgaged property, using all necessary force so to do, this court said (at page 476) :

“There is no doubt that such clauses are legitimate in mortgages and confer rights upon the mortgagees, but those rights must be enforced as every other contractual right is enforced. Because a party to a contract violates his contract and refuses to do what he agreed to do, is no reason why the other party to the contract should compel the performance of the contract by force. The adoption of such a rule would lead to a breach of the peace, and it is never the policy of the law to encourage a breach of the peace. The right to an enforcement of this part of the contract must, in the absence of a consent on the part of the mortgagor, be enforced by due process of law the same as any other contract.”

This reasoning is particularly applicable to the case at bar. If clauses of this kind in a lease may be summarily enforced by the parties thereto by force, then the statutes of the state defining unlawful detainer and providing a remedy by which a landlord may obtain possession may be entirely abrogated by contract which permits landlords to take the law into their own hands. When the complaint alleges the execution of the lease and possession thereunder,

Dec. 1902.] Opinion of the Court.—MOUNT, J.

and facts showing a wrongful eviction and damages, a cause of action is stated. The facts showing forfeiture or voluntary surrender, or any other matters of that kind, are proper to be set up in the answer. *Collins v. Hall*, 5 Wash. 366 (31 Pac. 972); *Spades v. Murray*, 2 Ind. App. 401 (28 N. E. 709).

It is next urged that the court erred in striking out of the complaint paragraph 5 thereof, which paragraph is as follows:

"That plaintiff has been in continuous and uninterrupted possession of said premises from July 1, 1894, until evicted as herein set out; that under his lease therefor, prior to that described in paragraph two hereof, he was authorized and permitted to make such improvements in and about the premises as should become necessary as trade fixtures for the business of himself and sub-tenants, with the privilege of removing such improvements and fixtures when he should desire to give up possession of said premises; that, relying on his rights as a tenant, plaintiff erected on said premises certain trade fixtures, consisting of an hydraulic elevator, at an expense of \$250, and also constructed two floors and various partitions in said warehouse, at an expense of \$750; that defendant, with full knowledge that plaintiff had erected said improvements under right to remove the same while in possession, executed said lease described in paragraph 2 aforesaid, whereby the right of plaintiff to remove said fixtures while in possession was continued during the period of said lease, together with the right to erect and remove additional trade fixtures as should become necessary for his use of such premises; that subsequent to July 1, 1899, plaintiff erected in said warehouse a chimney and various partitions at an additional expense of \$250: that all of the foregoing described improvements were made by plaintiff to enable him to make a profitable use of the premises, and with the intent that they should not become a part of the property of defendant, and that they could be removed without injury to the freehold as it was then leased to plaintiff; that by rea-

Opinion of the Court.—MOUNT, J.

[30 Wash.

son of the unlawful eviction of plaintiff by the acts and assumption of possession of the defendant over said premises and fixtures, he has been deprived of the right to remove such fixtures, which were then so leased by plaintiff, of the value of \$1,260."

The lease executed June 14, 1899, which is made a part of the record, makes no mention of any prior lease, and does not refer in any manner thereto, except to say that the leased premises are "now occupied by the party of the second part." No reservation is made therein that the appellant may make improvements or erect fixtures which may be removed at the expiration of the lease. The question therefore presented is, did the appellant, by executing the new lease on June 14, 1899, waive his right to remove the fixtures and improvements placed under the old tenancy? The weight of authority seems to be that where the tenant enters into a new lease, making no mention of a former lease or tenancy, and with no reservation for removal of fixtures placed under the former lease, his right to remove fixtures is thereby precluded. 2 Taylor, *Landlord & Tenant* (8th ed.), § 552; 2 Wood, *Landlord & Tenant* (2d ed.), § 529; 13 Am. & Eng. Enc. Law (2d ed.), 651; *Loughran v. Ross*, 45 N. Y. 792 (6 Am. Rep. 173); *Talbot v. Cruger*, 151 N. Y. 117 (45 N. E. 364); *Watriss v. First National Bank*, 124 Mass. 571 (26 Am. Rep. 694); *Jungerman v. Boree*, 19 Cal. 355; *Marks v. Ryan*, 63 Cal. 107; *Carlin v. Ritter*, 68 Md. 478 (13 Atl. 370, 6 Am. St. Rep. 467); *Hedderich v. Smith*, 103 Ind. 203 (2 N. E. 315, 53 Am. Rep. 509); *Williams v. Lane*, 62 Mo. App. 66. The reason for this rule is stated in *Hedderich v. Smith, supra*, as follows:

"It results from the terms of the lease, that whatever constituted a part of the freehold at the time the lease was accepted must be surrendered at its termination, and the

Dec. 1902.] Opinion of the Court.—MOUNT, J.

lessee will not be permitted to say that part of the premises leased was in fact a trade fixture, erected by him under a previous lease, and that he has the right, against the face of his contract, to sever and remove it. To permit the tenant to do this would, in effect, be to permit him to deny the title of his landlord to part of the demised premises; and if he may deny his title to a part, why not to the whole?"

In the case of *Carlin v. Ritter, supra*, the court says:

"If it was the intention of the parties in this or any other similar case, that the right to remove fixtures should continue, nothing was easier than to insert in the lease a clause to that effect; and it seems to us reasonable to infer from the absence of such a clause that it was their intention that this right should no longer continue."

"This rule, moreover, does not apply when the tenant merely holds over without a new demise, under permission from the landlord, or in such a way as to raise an implication of an extension of the original lease." 13 Am. & Eng. Enc. Law (2d ed.), p. 561, and cases cited. 2 Wood, Landlord & Tenant, § 552; 2 Taylor, Landlord & Tenant, § 529; *Estabrook v. Hughes*, 8 Neb. 496 (1 N. W. 132); *Wright v. MacDonnell*, 88 Tex. 140 (30 S. W. 907); *Young v. Consolidated Implement Co.*, 23 Utah, 586 (65 Pac. 720); *Lewis v. Ocean Navigation Pier Co.*, 125 N. Y. 341 (26 N. E. 301); *MacDonough v. Starbird*, 105 Cal. 15 (38 Pac. 510); *Glass v. Colman*, 14 Wash. 635 (45 Pac. 310).

Opposed to the rule that the taking of a new lease waives the right of removing fixtures, are the cases of *Kerr v. Kingsbury*, 39 Mich. 150 (33 Am. Rep. 362), and *Second National Bank v. O. E. Merrill Co.*, 69 Wis. 501 (34 N. W. 514). These cases are not distinguishable from the cases above cited. They are not without reason to support them, but we think the better rule, supported by the great weight of English and American authority, is the one followed by the lower court in striking paragraph

5 from the complaint. This ruling was, therefore, not error.

For the error in sustaining the demurrer, the cause is reversed and remanded for further proceedings.

REAVIS, C. J., and ANDERS and FULLERTON, JJ., concur.
DUNBAR, J., dissents.

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[No. 4147. Decided December 29, 1902.]

J. L. DRUMHELLER *et al.*, Respondents, v. AMERICAN SURETY COMPANY OF NEW YORK, Appellant.

APPEAL — BRIEFS — STATEMENT OF CASE.

Where appellant states in his brief the essential facts of the case, although not at the beginning, and makes reference to the place in the record where they can be found, it is a sufficient compliance with rule 8 of the supreme court, which provides that "briefs shall contain a clear statement of the case, so far as deemed material by the party, with reference to the pages of the transcript for verification."

BUILDING CONTRACT — ALTERATIONS — LIABILITY OF SURETIES.

Where a building contract contemplates the possibility of changes in the plans and specifications, a surety upon the bond of the contractor must be regarded as having consented in advance to alterations in the contract and cannot escape liability on the ground of alterations having been made without the express consent of the surety.

SAME — MAKING OWNER A SUB-CONTRACTOR — EFFECT.

A surety on a building contract cannot complain that the contractor permitted the obligees to construct a portion of the work and deduct the value thereof from the contract price, when the contract itself contemplated that a portion of the work might be performed by sub-contractors, and the obligees merely occupied that relation toward the contractors.

SAME.

A provision in a building contract that there shall be no alterations made except upon the written order of the architect re-

Dec. 1902.] Opinion of the Court.—ANDERS, J.

lates solely to changes in the work shown on the drawings and specifications and not to changes in the employment of the men engaged in performing the work.

SAME — LIQUIDATED DAMAGES — SUBMISSION OF CLAIM TO ARCHITECT.

The provision of a building contract requiring disputes as to claims for damages to be submitted to the architect, or to arbitrators, has no application to another provision providing liquidated damages for failure to complete the building within a stipulated time.

INSTRUCTIONS — COMMENT ON EVIDENCE.

When references to the evidence, made by the court in its charge to the jury, do not amount to an explanation or criticism of the evidence, nor assume that a particular fact is proven thereby, such references do not violate the constitutional prohibition against judges commenting upon matters of fact.

SAME.

Where there is no evidence as to a particular matter, it is not a comment on the facts for the court to tell the jury that "the testimony is silent as to that point."

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Affirmed.

C. S. Voorhees and Reese H. Voorhees, for appellant.

Crow & Williams, for respondents.

The opinion of the court was delivered by

ANDERS, J.—This was an action instituted by the respondents against the defendants Rief and Schiefer, as principals, and the American Surety Company of New York, as surety, on a bond executed by said principals and said surety for the faithful performance of a contract which the said principals had entered into with the respondents for the construction of a certain building in the city of Spokane. The bond in question is in the sum of \$4,000, and the respondents (plaintiffs below) by this action seek to recover the damages alleged to have been sustained by them by reason of the failure of the said con-

tractors, Rief and Schiefer, to perform their said contract according to its terms and conditions. The contract involved herein is in writing, and the execution of the bond and agreement by the respective parties designated therein is admitted. It appears that the said Rief and Schiefer (hereinafter called the "contractors") undertook and agreed, under the direction and to the satisfaction of John K. Dow, architect, acting as agent for the owners (respondents) to provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architect for the four story and basement brick and stone building situated at the corner of Front and Howard streets, Spokane, Washington, including everything necessary to complete the building, except the heating and plumbing, for the sum of \$14,900, which sum the respondents agreed to pay at the times and upon the conditions set forth in the written agreement. The specifications of the architect called for the construction of an asphalt sidewalk around designated portions of the building, and it seems to have been understood by all parties that such sidewalk was included in the building contract, though not expressly mentioned therein. This contract was entered into in July, 1899, and article 6 thereof provides that "the contractor shall complete the whole of the work comprehended in this agreement on or before the first day of December, 1899, provided that possession of the premises be given him on or before the 26th day of July, 1899," and that "time is made the essence of this contract, and for every day that said contractor fails after the time herein limited to complete said work herein mentioned he shall pay to the owner, as liquidated damages for such delay, the sum of ten dollars per day until the work is completed." And in article 3 it is stipulated that: "Alterations may be made in the work herein pro-

Dec. 1902.] Opinion of the Court.—ANDERS, J.

vided for, but no alterations shall be made in the work shown or described by the drawings and specifications, except on a written order of the architect, and, when so made, the value of the work added or omitted shall be computed by the architect, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or deducted shall be referred to three disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen, the decision of any two of whom shall be final and binding; and each of the parties hereto shall pay one-half of the expense of such reference.” The contract also provided that if, at any time, there shall be evidence of any lien or claim for which, if established, the owner of the premises might become liable, and which is chargeable to the contractor or sub-contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim; and that, if there be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises, made obligatory in consequence of the contractor’s default.” It is further stipulated in the contract (article 7), in effect, that, should the contractor be delayed in the prosecution or completion of his work by any act, neglect, delay, or default of the owner or the architect, or any other contractor employed by the owner, or any damage which might happen by fire, lightning, earthquake, or cyclone, then the time fixed for the completion of the work should be extended for a period equivalent to the time lost by reason of any or all of said causes; but no such allowance should be made unless a claim therefor

should be presented to the architect in writing within twenty-four hours after the occurrence of such delay, and that the duration of such extension should be certified to by the architect; but the right was reserved by the parties to appeal from his decision to arbitration, as provided in article 3 of the contract.

The respondents alleged in their complaint, in substance, among other things: That they were the owners of certain land in the city of Spokane, which they specifically described. That on July 27, 1899, they entered into a contract in writing with the defendants Rief and Schiefer, whereby the said defendants agreed to erect and construct a four-story building upon said real estate for the plaintiffs, which contract was attached to and made a part of the complaint. That on the 29th day of July, 1899, the said defendant, the American Surety Company of New York, for the purpose of guarantying the performance of said contract by the said Rief and Schiefer, executed and delivered to the plaintiffs its bond of indemnity, which bond is set out *in extenso* in the complaint, and contains the following recitals:

"The condition of this obligation is such that whereas, a contract and agreement has been made and entered into between the above bounden principals and J. L. Drumheller and A. A. Barnett, for the construction of a four-story and basement brick and stone building situated on part of lots one (1) and two (2), block two (2), Resurvey and Addition to Spokane, Washington, including everything to complete the building, except the heating and plumbing, a true copy of which said agreement is hereto annexed and made a part hereof; now, therefore, if the said above bounden principals shall and will fully and completely perform all the conditions of said contract hereto annexed faithfully in every respect, and shall pay for all materials furnished and labor performed in the execution of said contract, to the parties entitled thereto, and all

Dec. 1902.] Opinion of the Court.—ANDERS, J.

damages, expenses, and charges due to J. L. Drumheller and A. A. Barnett under said contract by reason of the non-performance thereof strictly and literally as in said contract provided, then this obligation to be void; otherwise to be and remain in full force and effect."

That defendants, Rief and Schiefer, duly entered upon the performance of said contract, and completed the building, but failed to complete the same within the time required by said contract, and did not complete it until the first day of March, 1900. "That by the terms of said building contract these plaintiffs were to pay said Rief and Schiefer for the construction of said building, including the laying of an asphalt sidewalk around said building, in accordance with the plans and specifications prepared by J. K. Dow, architect, the total sum of \$14,900. That afterwards these plaintiffs determined to construct a cement sidewalk around said building, instead of said asphalt sidewalk, and by agreement then entered into between these plaintiffs and the said A. Rief and Frank Schiefer, with the consent of said American Surety Company of New York, it was agreed that these plaintiffs should construct said cement sidewalk themselves at their own expense, and that said Rief and Schiefer, by reason of being relieved from constructing said asphalt sidewalk, should allow plaintiffs the sum of \$375 on said contract price for said building;" that during the progress of the construction of said building the plaintiffs from time to time made payments to said Rief and Schiefer upon estimates made by J. K. Dow, architect, aggregating the sum of \$12,464. That when said building was completed the plaintiffs learned that the contractors, Rief and Schiefer, had incurred large bills and liabilities for labor performed upon and materials used in the construction of said building, which plaintiffs

requested the said Rief and Schiefer and the said American Surety Company to fully pay and settle, but all of said defendants have neglected and refused to pay the same. That by reason of the non-payment of said bills the various parties who had furnished said labor and material in the construction of said building were threatening to claim liens thereon. That, for the purpose of protecting said property from said liens, the plaintiffs were obliged to pay, and did pay, large sums of money in discharging said claims for labor and material performed and furnished at the request of said Rief and Schiefer, amounting in all to \$2,988.65. That by the terms of their contract the said contractors agreed to complete the said building on or before December 1, 1899, provided that possession of the premises should be given them on or before July 26, 1899, and that possession was so given them before said date. That it was stipulated in said contract that for every day said contractor should fail to complete the said building after the time directed therein they should pay to the plaintiffs the sum of ten dollars per day until said work should be completed; and that without any fault on the part of the plaintiffs, and by reason of the fault and neglect of said Rief and Schiefer, the completion of said building was delayed until March 1, 1900, a period of ninety days, and by reason thereof the plaintiffs were damaged in the sum of \$900. The plaintiffs, by reason of the premises, demanded judgment against the defendants for \$1,827.65, together with interest thereon from the date of the filing of the complaint. The contractors and the surety company filed separate answers to the complaint, which answers were, however, for the most part substantially alike.

The defendants, in their answers, admit the execution of the contract and bond as alleged in the complaint; ad-

Dec. 1902.] Opinion of the Court.—ANDERS, J.

mit that the plaintiffs from time to time during the progress of the work upon the building, made payments to the contractors upon estimates made by the architect amounting to the sum alleged by plaintiffs; admit that the plaintiffs, after the completion of the building, paid certain claims for materials and labor which were chargeable against the contractors, and for which the claimants were entitled to liens upon the building; admit the making of the agreement set forth in paragraph 7 of the complaint, whereby it was agreed between the plaintiffs and said contractors that the former should, at their own expense, build a cement, instead of an asphalt, sidewalk around said building, and in consideration thereof, and of being released from constructing the same, the contractors were to allow plaintiffs to deduct the sum of \$375 from the contract price of the building, but deny that the defendant The American Surety Company consented that the plaintiffs might construct the said sidewalk, or that the sum of \$375, or any sum, might be deducted from the contract price of the building on account of the construction thereof by plaintiffs, or that said defendant consented to any change of the original contract concerning said sidewalk, except that said sidewalk might be constructed of cement instead of asphalt, and that the increased cost occasioned by such change, if any, should be paid by plaintiffs; admit that under the provisions of their contract, the defendants Rief and Schiefer agreed to complete the said building on or before December 1, 1899, and that the completion of said building was delayed until March 1, 1900, a period of 90 days, but deny that said delay, or any part thereof, occurred without the fault of plaintiffs, or that by reason thereof plaintiffs were damaged in the sum of \$900, or at all. The defendants Rief and Schiefer, in addition to the

denials in their answer, set up certain claims for extra work, among which was a claim for \$231.50 for labor performed in strengthening the foundation of the wall of an adjoining building, which was to be used as a party wall by plaintiffs, and for which labor said defendants alleged the plaintiffs agreed to pay. The said defendants also pleaded certain matters by way of excuse for not completing the building within the time limited in their contract, and, as a further and partial defense, alleged that the plaintiffs orally agreed with said Rief and Schiefer to extend the time for the completion of said building until March 1, 1900, at which time it was completed. The affirmative matter alleged in the answers was denied in the reply; and, under the issues presented by the pleadings, a trial was had resulting in a verdict and judgment for the plaintiffs against all the defendants. From such judgment the defendant, American Surety Company, alone has appealed.

The respondents (plaintiffs below) move to strike the brief of appellant, and to dismiss the appeal, for the alleged reason that the appellant has utterly failed to comply with the requirement of subdivision 1 of rule 8 of this court in that it has failed to make a clear statement of the case, and has also failed to refer to the pages of the transcript for verification. Subdivision 1 of rule 8, which respondents contend has not been complied with by appellant, reads as follows:

“Briefs shall be printed throughout in plain, clear type, and shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages of the transcript for verification.”

The manifest object of this rule is to apprise this court, and the opposite party of the real nature and character of the case presented for determination, as understood by

Dec. 1902.] Opinion of the Court.—ANDERS, J.

the party making the statement. While it is the usual and the better practice to state generally, at least, at the beginning of the brief, all matters deemed material or essential, still the rule does not require every material matter and thing which was considered by the trial court to be set forth in such preliminary statement. If the essential facts of the case are clearly stated in the brief, though not *in limine*, and the place in the record where they can be found is referred to, it cannot well be said that the provision of the rules in question has not been complied with. In the case at bar it is stated in the first part of appellant's brief, in effect, that this action was brought by J. L. Drumheller and A. A. Barnett against A. Rief and Frank Schiefer and the American Surety Company of New York for breach of a building contract entered into between the plaintiffs and said Rief and Schiefer by which the latter undertook to construct for the plaintiffs a building and a sidewalk in the city of Spokane; the said contract being referred to as Exhibits "A" and "C", attached to the statement of facts; that a bond was executed by the contractors for the faithful performance of the contract, and that the American Surety Company executed the bond as surety thereon, referring to the bond as Exhibit B, attached to the statement of facts; that a verdict was returned and judgment entered against the defendants, the contractors and the surety on the bond, from which judgment the surety company alone appeals; that the respondents pleaded in their complaint (par. 7, Transcript, p. 3), that they had, by an agreement with the contractors made subsequent to the original contract, reduced the contract price to the extent of \$375, and arranged for the sidewalk to be built by other parties than the contractors, with the consent of the American Surety Company; that, no proof of such

consent having been offered, the appellant company, when the respondents rested, challenged the sufficiency of the evidence, and moved the court to take the case from the jury, and for judgment; that the motion was overruled; that, there being no evidence of such consent in the case when the evidence was all in, appellant requested the court to instruct the jury to return its verdict for appellant, which the court refused to do; and that "there are several other questions stated and discussed in the brief." Considering this general statement in connection with the further statements of other questions "stated and discussed" elsewhere in the brief, we are satisfied that the appellant has substantially complied with the rule invoked by the respondents. Nor do we think that the respondents have in any wise been prejudiced by reason of the omission of any material fact on the part of appellant in the statement of its case. Indeed, it clearly appears to us from an examination of their brief, that the respondents thoroughly understood the case as presented in the brief of the appellant. It is true, we have been compelled, in some instances, to disregard briefs, and affirm judgments appealed from, for flagrant violations of the rules of this court, and especially for a failure to point out the errors relied on for a reversal of the cause; but such is not the case in hand. We are of the opinion that the appellant is entitled to have its case, as presented, considered upon its merits, and the motion to strike the brief and dismiss the appeal is therefore denied.

The learned counsel for the appellant earnestly insist that the court below erred (1) in overruling their motion, made at the close of respondents' evidence, to take the case from the jury, and for judgment, on the ground of insufficiency of the evidence, and (2) in refusing to instruct the jury, as requested by appellant at the close of

Dec. 1902.] **Apinion of the Court.—ANDERS, J.**

the evidence, to return their verdict in favor of the appellant. The argument of appellant is mainly addressed to these two assignments of error, and we will consider them together, as they are both based upon the idea that there was no proof at the trial in the court below that the appellant ever consented to the change in the contract guaranteed by appellant, whereby the contractors were released from the obligation to construct the sidewalk, as pleaded by the respondents in paragraph 7 of their complaint, and above set forth in our statement of the facts.

Numerous authorities are cited in the brief of the appellant in support of the proposition that changes in a contract, the faithful performance of which the surety has guaranteed, if made without the consent of the surety discharges him, even though the changes may be beneficial to the surety; that the liability of the surety does not extend beyond the very terms of his contract, and that no equitable considerations can be permitted to operate against a surety. That the doctrine announced and contended for by appellant as to the rights and liabilities of a surety is uniformly maintained by the courts, and is well founded in reason, is frankly conceded by the learned counsel for the respondents; but they insist that it has no application to this case for the alleged reason that it is abundantly shown by the record that the appellant did in fact consent to the alteration of the contract of which it now complains. It is not claimed, however, by counsel that such consent was shown by the testimony of any witness who testified at the trial of the case. Their contention is that the change in the contract was provided for in the contract itself, as well as in the bond, both of which were introduced in evidence by the respondents, and was, therefore, consented to by the appellee.

Opinion of the Court.—ANDERS, J.

[30 Wash.]

lant when it executed the bond, and that no other or further proof of such consent was required. And, if it be true that the contract contemplated and provided for such an alteration as was made by the parties thereto, it follows that the appellant will not be discharged from the obligation of its bond on the ground that it did not consent to such alteration.

In *DeMattos v. Jordan*, 15 Wash. 378 (46 Pac. 402), this court held that sureties on the bond of a building contractor are not discharged by deviations from the specifications in the construction of the building, nor even by material alterations, when the contract itself permits such deviations or alterations to be made. *American Surety Company v. Lauver*, 22 Ind. App. 326 (53 N. E. 793), was an action on a bond for the faithful performance of a contract entered into between one Hutton and the board of education of South Bend, Indiana, for the construction of a certain school house. In that case, as in this, the contract and the bond in question were made a part of the complaint, and their execution admitted. The surety claimed that it was discharged by reason of a change in the contract. The provisions of the contract as to changes and alterations in the work were, in substance, the same as the provisions incorporated into the contract here under consideration; and in that case the court said:

"The third article of the contract between Hutton and the board provides that 'no alteration shall be made in the work shown or described in the drawings and specifications, except upon a written order of the architects.' Provision is also made for estimating the value of the work added or omitted, and for reference to arbitration in case the architect and contractor cannot agree as to the value of the changes. The contract thus contemplated that changes may be made as the work progresses, and provides therefor. The sureties, in the execution of the

Dec. 1902.] Opinion of the Court.—ANDERS, J.

bond, consented in advance to changes that might be made properly within the scope of the contract. The answer does not aver that the changes were not made in the manner provided by the building contract. If Hutton, for purposes of his own, made the changes, his sureties would not be thereby relieved. It is averred, as to one item of change, that the change so stated was carried out and performed by the said Hutton under the instruction of the architect of said building. It will be presumed, in the absence of an averment to the contrary, that the changes were made conformably to the provisions of the contract. The sureties consented in advance to changes that might be made conformably to the terms of the contract."

The decision in the above cited case fully supports the respondents' contention, and is directly in line with the ruling of this court in *DeMattos v. Jordan, supra*. And the question, then, is, was the change in the work, of which the appellant complains, contemplated and provided for by the agreement between the contractor and the respondents? We think that a proper construction of the contract warrants the conclusion that it was. It must be borne in mind that it is admitted in the pleadings that the appellant consented to the substitution of cement for asphalt in the construction of the sidewalk. And it is argued by appellant's counsel that this substitution of one material for another constituted the only real change made "in the work," so far as the sidewalk was concerned, and that the agreement permitting the respondents themselves to construct it simply effected a change "in the workers," and not in the work, and that no such change was ever consented to by appellant, or authorized by the contract between its principal and the respondents. It is admitted that the sidewalk was actually built in conformity with the specifications of the architect, except as

to the material used in its construction; and counsel are therefore fully justified in asserting that that change constituted the only alteration that was made in the work, with respect to the sidewalk. But we are not convinced that the contractors were not at liberty, under this contract with the respondents, to allow the latter to construct the sidewalk for a specified consideration, and to deduct the value thereof from the original contract price of the whole work. On the contrary, we are clearly of the opinion that they had the right to employ the respondents, or any other person or persons, to perform that part of the work. An examination of the building contract discloses that it was understood by the parties making it that at least a portion of the work might be performed by sub-contractors. This is evident from the fact that the contract expressly provides for the discharge of liens claimed by sub-contractors. Had the contractors employed a stranger to build the sidewalk for \$375, we think it would hardly be contended that such employment was not within the scope of the original contract. We also think that the arrangement with the respondents for the building of the sidewalk had no more effect upon the liability of the appellant than the employment of any other persons would have had. As to the work performed by them, the respondents were, to all intents and purposes, merely sub-contractors. Assuming that we are correct in our conclusion that the respondents constructed the sidewalk for, and as the employees of the contractors, it follows that the objection that it was neither alleged nor proved that such work was done "upon the written order of the architect," as specified in the contract, cannot be sustained, as that provision relates solely to changes in the work shown on the drawings and specifications, and not to the employment of the men engaged in performing the work.

Dec. 1902.] Opinion of the Court.—ANDERS, J.

As to respondents' claim for \$900 on account of the admitted delay in the completion of the buildings, the court instructed the jury as follows:

"I instruct you, gentlemen of the jury, that, under the admitted facts in the pleadings in this case, you must find a verdict for the plaintiffs for the delay in completing this building, for the period of ninety days, of \$900, unless you find the defense or excuse for that, which is set up by defendant in his answer, is sustained by the testimony. The defendants allege with reference to that matter several defenses. The only defense, however, which the court submits to you, and which, as a matter of law, you are entitled to consider under the facts and testimony in this case, is the following: That the plaintiffs orally agreed with the defendants, Rief and Schiefer, after the making of the said building contract, and so modified said building contract that these defendants, Rief and Schiefer might and should have until the first day of March, 1900, within which to fully perform said building contract and complete said building, and consented to such extension of time and said building was completed within such extended time. As to that defense, I charge you that if you find from the testimony in this case that there was an oral agreement between Mr. Drumheller and either Mr. Rief or Mr. Schiefer, by which they should have an extension of time until March 1st in which to complete this building, your verdict as to that item of \$900 must be for the defendants."

The appellant claims that the court erred in thus instructing the jury, for the reason that the respondents were not entitled, under the contract, to recover any damages for delay in completing the building, without alleging and proving that such damages had been fixed and determined by the architect, or by arbitration, in accordance with articles three and eight of the contract, and that the court should have so instructed the jury. But we are of the opinion that the provisions of the contract invoked

Opinion of the Court.—ANDERS, J.

[30 Wash.]

by the appellant have no relation to the matter of liquidated damages, and that this instruction, as given to the jury, is not obnoxious to the objection urged against it. *Chandler v. Borough of Cambridge Springs*, 200 Pa. St. 230 (49 Atl. 772). The contractors and the respondents had a perfect right to provide by contract for the payment of a fixed sum of money for the failure to complete the building within a certain time, and, having so provided, it would be unreasonable to suppose that they intended to submit that question either to the architect or to arbitrators, for determination. Stipulations for liquidated damages are generally inserted in contracts like that in suit for the sole purpose of avoiding the possible or probable difficulty of proving the exact damages that may result from a breach of the contract; and, where such agreements are deliberately and intentionally entered into, they are binding upon the parties, and will be upheld by the courts. See *Reichenbach v. Sage*, 13 Wash. 364 (43 Pac. 354, 52 Am. St. Rep. 51); *Jennings v. McCormick*, 25 Wash. 427 (65 Pac. 764); *Young v. Gaut*, 69 Ark. 114 (61 S. W. 374). It sometimes happens that provisions apparently for liquidated damages are really nothing but stipulations for penalties or forfeitures, against which the courts, in proper cases, will grant relief. The rule applicable to these two classes of contracts is tersely stated by the court in *Young v. Gaut*, *supra*, as follows:

“While courts of equity afford relief against penalties, they cannot relieve against liquidated damages.”

As we have already said, the defendants, in their answer, set up a claim amounting to \$231.50, for extra work upon or about the foundation of the building. There was no averment in the pleadings of the respondents as to the value of this extra work, but at the trial the architect was called as a witness, and testified that the value of the

Dec. 1902.] Opinion of the Court.—ANDERS, J.

work did not exceed \$120; and, in submitting this controverted claim to the jury, the court said:

"They [meaning defendants] claim that it is two hundred and thirty-one dollars and a half. The plaintiffs here as to that item claim that it was not worth so much. Their claim with respect to it, as shown by the testimony in the case, is that it was not worth more than \$120."

The appellant insists that the court, in making this statement to the jury, violated that provision of the constitution which prohibits judges from charging juries with respect to matters of fact, or commenting thereon. But we do not think that these remarks of the judge fall within the spirit of the constitutional inhibition. It was the province of the judge to tell the jury what the *claims* of the respective parties were as to the particular matter in question; and, although in so doing he incidentally referred to the testimony, his statement, in our judgment, did not amount to a comment upon the evidence, within the meaning of the constitution. It certainly did not indicate to the jury that the evidence established, or tended to establish, the claim of either party. The court did not state, as the judge did in effect, in *State v. Hyde*, 20 Wash. 234 (55 Pac. 49), cited by appellant, what testimony had been given in the case. The statement made by the judge in the *Hyde Case*, which was disapproved by this court, was as follows: "My notes show that Concannon testified that appellant on the way to the station admitted to him (Concannon) that he struck the prosecuting witness the blow." The distinction between that case and this is apparent. In the recent case of *French v. Seattle Traction Co.*, 26 Wash. 264 (66 Pac. 404), we held that, when references to the evidence, made by the court in its charge to the jury, do not amount to an explanation or criticism of the evidence, nor assume or assert

Opinion of the Court.—ANDERS, J. [30 Wash.

that a particular fact is proven thereby, such references are not violative of the provision of the constitution which prohibits judges from commenting upon matters of fact. Under the rule there announced, the instruction here complained of was not improper.

It seems that there was some controversy between the respondents and the contractors as to the value of an extra door which had been placed in the building, and for which, it was admitted, the contractors should be paid. The court, in charging the jury, omitted to mention the item of the door until its attention was called to it by counsel for the respondents. At that time one of the jurors asked the court what kind of a door it was that was furnished, and the judge replied: "I think the testimony is silent as to that point, as to the kind of door it was. You will simply have to determine that matter from the testimony in the case. I do not think there is any testimony about it." It is also claimed by appellant that this reply of the court to the interrogatory of the juror constituted a further comment upon the evidence, but we are not of that opinion. It is always proper for the court to state to the jury that there is no evidence as to a certain matter, when, as in this case, such is the fact. But it is for the jury alone to determine the weight of the evidence submitted to them, without interference or suggestion on the part of the court.

Some other objections are made to the court's instructions to the jury, but, inasmuch as they are not discussed in appellant's brief, we shall content ourselves by simply saying that we do not deem them well taken.

We find no error in the record and the judgment must, therefore, be affirmed, and it is so ordered.

REAVIS, C. J., and DUNBAR, FULLERTON and MOUNT, JJ., concur.

Dec. 1902.]

Syllabus.

[No. 4121. Decided December 30, 1902.]

**JOHN H. McDANIELS, Appellant, v. J. J. CONNELLY
SHOE COMPANY et al., Respondents.**

30	549
31	196
30	549
35	345
35	588
30	549
36	182

GARNISHMENT — ISSUES.

Where garnishees answer that they have no property of the principal defendant, a controverting affidavit that they bought a stock of goods in bulk from defendant under circumstances prohibited by statute sufficiently raises an issue, under Bal. Code, § 5409, which provides that, if the plaintiff should not be satisfied with the answer of the garnishee, he may controvert the same by affidavit in writing signed by him stating that he has good reason to believe that the answer of the garnishee is incorrect, and in what particular he believes it is incorrect.

**CONSTITUTIONAL LAW — SALE OF GOODS IN BULK — RESTRICTIONS ON
RIGHT — DUE PROCESS.**

The act of March 16, 1901 (Laws 1901, p. 222), to regulate the purchase, sale, transfer and incumbrance of stocks of goods, wares or merchandise in bulk, and declaring same void under certain circumstances, is a rightful exercise of legislative power, under the police powers of the state, for the protection of the public and the prevention of frauds among individuals, and hence not a violation of the constitutional prohibition against depriving persons of their property without due process of law, on the ground of restricting the rights of certain individuals to dispose of their property.

SAME — CLASS LEGISLATION.

An act restricting retail merchants from transferring their stocks of merchandise in bulk, without making provision for the payment of creditors, is not class legislation within the meaning of the constitution, merely because it does not apply to all owners of property, so long as it applies alike to all persons in the class engaged in retailing merchandise.

SAME — RESTRAINT OF TRADE.

Such an act is not in restraint of trade, since it does not prevent the sale of stocks of goods in bulk, but merely restricts the application of the proceeds, when stocks are sold in that manner.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM H. SNELL, Judge. Reversed.

Opinion of the Court.—**FULLERTON, J.** [30 Wash.

Bates & Murray, Leopold M. Stern, F. S. Blattner, John H. McDaniels and Fenley Bryan, for appellant.

Ira A. Town, A. R. Titlow and F. M. Halsted, for respondents.

The opinion of the court was delivered by

FULLERTON, J.—The appellant brought an action in the superior court of Pierce county against the J. J. Connelly Shoe Company, as defendant, to recover upon certain accounts for merchandise which had theretofore been assigned to him by the wholesale dealers who had sold the merchandise to the defendant. At the time of commencing the action the appellant sued out a writ of garnishment against the respondents A. J. Burchill and William Turner, averring in his affidavit for the writ, in the language of the statute, that he had reason to believe, and did believe, that the respondents were indebted to the defendant the J. J. Connelly Shoe Company, and that they had in their possession and under their control personal property and effects belonging to the defendant. The respondents answered separately to the writ, averring, in substance, that they were not indebted to, and did not have in their possession or under their control any personal property or effects of, the defendant. To these answers the appellant filed a controverting affidavit, in which he alleged that he had good reason to believe, and did believe, that the answers of the respondents were incorrect, particularly that part of the answers which averred that the respondents had no personal property or effects in their possession or under their control belonging to the defendant; further averring, in substance, that the defendant had theretofore been engaged in the retail boot and shoe business in the city of Tacoma, and had become indebted in large sums to various wholesale dealers, among whom

Dec. 1902.] Opinion of the Court.—FULLERTON, J.

were the assignors of the appellant; that just prior to the commencement of the action the defendant had undertaken to sell to the respondents, and the respondents had undertaken to purchase of the defendant, its stock of goods in bulk; that the goods had been delivered, and the agreed purchase price paid, without a compliance with the provisions of the statute relating to the sale of stocks of goods in bulk, and was therefore fraudulent and void. The respondents thereupon moved for a discharge upon their answers, which motion the trial court granted, entering a judgment of dismissal of the garnishee action. This appeal is from that judgment.

The trial judge sustained the motion to dismiss on the ground that the act of the legislature of March 16, 1901, relied upon by the appellant, is unconstitutional and void; and it is to this question that the arguments are mainly directed. The respondents, however, insist that the controverting affidavits were insufficient to raise an issue, and that the judgment of dismissal should be sustained for that reason. But without following the argument in detail, we are satisfied that the affidavits were sufficient to raise the issue sought to be raised. The statute (§ 5409, Bal. Code) provides that, if the plaintiff should not be satisfied with the answer of the garnishee, he may controvert the same by affidavit in writing signed by him, stating that he has good reason to believe that the answer of the garnishee is incorrect; stating in what particulars he believes the same is incorrect. The affidavits controverting the answers of the respondents sufficiently complied with the statute in this respect. They not only stated that the appellant had good reason to believe, and did believe, that the answers were incorrect in the particular wherein it was averred that the respondents had no property or effects in their possession or under their

control belonging to the defendant, J. J. Connelly Shoe Company, but the grounds upon which that belief was based were detailed at length, namely, facts were alleged tending to show that the respondents had taken into their possession and attempted to acquire title to a stock of goods belonging to the defendant under circumstances prohibited by statute.

The further question involves the constitutionality of the act of March 16, 1901 (Laws 1901, p. 222; Pierce, Code, § 5346 *et seq.*). The first section of this act makes it the duty of every person who shall bargain for or purchase any stock of goods in bulk, for cash or on credit, before paying the vendor any part of the purchase price thereof, to demand of and receive from the vendor a written statement showing the names and addresses of all of the creditors of the vendor, together with the amount of such indebtedness, whether due or to become due, owing to each of such creditors, verified according to a form set out in the statute. The second section makes "fraudulent and void" any sale of a stock of goods in bulk unless the vendee demands and receives from the vendor the statement mentioned in the first section, verified as therein provided, "and without paying, or seeing to it that the purchase money of said property, is applied to the payment of the *bona fide* claim of creditors of the vendor as shown upon such verified statement, share and share alike." The third section makes it perjury on the part of a vendor to make and deliver a statement which does not include all of the creditors of the vendor, with the correct amounts owing to each of them, or which contains any false or untrue statement, and provides a punishment for the same. The fourth section declares that any sale or transfer of a stock of goods out of the usual

Dec. 1902.] Opinion of the Court.—FULLERTON, J.

or ordinary course of business or trade of the vendor or whenever substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed, or whenever an interest in or to the business or trade shall be sold or conveyed, or attempted to be sold or conveyed, shall be a sale in bulk, in contemplation of the act; followed by a proviso to the effect that, if the vendor shall produce and deliver a written waiver of the provisions of the act, then this section shall not apply. The fifth and last section provides that nothing in the act contained shall apply to sales by executors, administrators, or receivers, or to sales made by any public officer acting under judicial process.

The first objection to the constitutionality of the act is that it deprives persons of their property without due process of law. As we understand the argument, the contention is not that the act deprives an owner of property of his day in court, where his property rights are judicially called in question, or that it in any manner authorizes the actual physical taking by one of the property of another, but it is that as the term "property," in legal signification, includes in its meaning the right of any person to possess, use, enjoy, or dispose of a thing, the act violates the constitution, inasmuch as it restricts the right of an owner to dispose of his property. The act, it is true, does prohibit owners of certain kinds of property from disposing of it in a particular way, without complying with certain conditions, but it is not for that reason necessarily unconstitutional. While the legislature may not constitutionally declare that void which in its nature is, and under all circumstances must be, entirely honest and harmless, yet it may, under its police powers, place such reasonable restrictions on the right of an owner in relation to his prop-

erty as it finds necessary to protect the interests of the public, or prevent frauds among individuals. If this were not so, it would be easy to find many unconstitutional acts on the statute books. Statutes familiar to every person, such as those regulating the manner of conveying real property, regulating the mortgaging and sale of personal property, requiring certain articles of food made in imitation of other well known articles to be branded with their true names, regulating the sale of poisons, and the like, are statutes restricting the rights of an owner in relation to his property, yet such statutes, in so far as they tend reasonably to prevent injury to the public, and frauds among individuals, are uniformly held constitutional. Turning to the act before us, its purpose is plain. It was intended to prevent retail dealers in goods, wares, and merchandise from defrauding their creditors. As such, it is among the undoubted subjects of legislation; and the real question to be considered, therefore, is, is the act so far an abuse of the power of legislation as to take it out of the rule of due process of law? In our opinion, it is not. It is a general rule that, when the business is a proper subject of police regulation, the legislature may, in the exercise of that power, adopt such measures as they see fit to correct the existing abuses, so long as the measures adopted have relation to and a tendency to accomplish the desired end, and violate no direct constitutional provision. This act is within the rule. That it has relation to and will tend to prevent the particular frauds aimed at, cannot be doubted. Nor is there any direct constitutional provision against the enactment of such laws. Whether the act is more harsh than was necessary, or whether it is not the wisest or best that could have been adopted, are legislative questions, with which the courts have nothing to do. It is enough for

Dec. 1902.] Opinion of the Court.—FULLERTON, J.

the court to know that the act is within the legislative power.

It is next said that the act violates that provision of the constitution which prohibits the legislature from granting to a class of citizens privileges and immunities which upon the same terms shall not equally belong to all citizens; in other words, it is class legislation. In *Redford v. Spokane St. Ry. Co.*, 15 Wash. 419 (46 Pac. 650), we held that, where a law is uniform so far as it operates, its constitutionality is not affected by the number of persons within the scope of its operation; and, applying this principle, we held in *Fitch v. Applegate*, 24 Wash. 25 (64 Pac. 147), that a law giving laborers in certain enumerated industries liens upon the general property of their employers was constitutional. The same principle is applicable to the case in hand. It is true that the mere fact of classification is insufficient to relieve a statute from the reach of this clause of the constitution,—that it must appear that the classification is made upon some reasonable and just difference between the persons affected and others, to warrant classification at all; but, applying this test, the act is sufficient. The reason is found in the nature of the business itself. It is well known that the business of retailing goods, wares, and merchandise is conducted largely upon credit, and furnishes an opportunity for the commission of frauds upon creditors not usual in other classes of business. In fact, charges of fraud made against retail dealers who have sold their stocks in bulk are among the most common with which the courts are called upon to deal. Legislation, therefore, which restricts the absolute right of persons engaged in such business to transfer their property, so long as it applies alike to all persons engaged therein, is not class legislation, within the meaning of the con-

stitution, merely because it does not apply to all owners of property. Nor is the act in restraint of trade. It prevents no one from dealing in the usual and ordinary course, nor does it prevent the selling of stocks of goods in bulk. It restricts only the application of the proceeds when stocks are sold in the latter manner. It may be that, because of this, sales in this manner will not be so readily made as formerly; but, if this be so, it is only another case where private desires must yield to the public good, and not one of unconstitutional enactment.

As to the particular provisions of the act, there is, indeed, much that may be criticised, and doubtless certain of its provisions will require construction when attempt is made to work it out in detail. But the former are not so gross as to authorize the courts to declare the law a nullity, and the latter can best be determined when the questions actually arise.

The judgment of the trial court is reversed, and the cause is remanded, with instructions to proceed with a hearing upon the merits.

REAVIS, C. J., and DUNBAR, ANDERS and MOUNT, JJ., concur.

[No. 4128. Decided December 30, 1902.]

L. B. NASH, *Appellant*, v. W. J. C. WAKEFIELD, as *Administrator*, et al., *Respondents*.

APPEALABLE ORDERS — ALLOWANCE OF ATTORNEY FEES IN ADMINISTRATION OF ESTATE.

The order of the court denying the petition of an attorney in a probate proceeding for the allowance of his fees for services rendered the executor of a decedent's estate is not an appealable or-

Dec. 1902.]

Opinion Per Curiam.

der, since the allowance of such fees comes up properly on the accounting made by the executor, at which time he is entitled to credits for reasonable charges paid by him for legal services, to be allowed as part of the expenses of administration, and only the orders made upon such accounting are final ones.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Appeal dismissed.

James Dawson, R. E. Porterfield and L. B. Nash, for appellant.

F. T. Post, for respondents.

PER CURIAM.—Appeal from an order made in probate in the estate of Rudolph Gorkow, deceased. Two executors were appointed under the will, with directions to continue the business of the estate, which consisted principally of a large brewery and brewing plant in the city of Spokane, until the settlement and distribution thereof. The executors were directed to convert the estate into money, pay certain legacies at the end of two years, and distribute the residue to certain devisees in Germany. The executors were also desired to consult certain counsel when legal services or advice was necessary. Boeck and Mueller were appointed executors. Some time after entering upon the discharge of their duties as such, the executors disagreed between themselves as to the management of the estate, and Boeck entered into written contract with the petitioner by the terms of which petitioner was engaged as sole attorney, and counsel for Boeck and the estate. Shortly thereafter Mueller was removed from his place as executor for misconduct, and some time thereafter Boeck was also removed as executor, and Wakefield was appointed administrator *de bonis non*, with the will annexed. Petitioner performed services under his contract with Boeck,

and presented his claim therefor to the administrator, Wakefield, who formally rejected the claim. Thereupon petitioner duly filed his claim in the probate procedure of the estate then pending, and demanded the allowance thereof. Citations were issued to Boeck and Wakefield to show cause why the prayer of the petition should not be allowed. Boeck answered, admitting the contract with petitioner, and averring that he did not know the value of petitioner's services, and requesting their adjustment and settlement by the court. Wakefield appeared, and objected to the petition on the ground that the court had no jurisdiction in probate to determine such claim, and that the petition did not state facts sufficient to entitle petitioner to relief. The same objections were also interposed by demurrer. The objections were overruled. The administrator then answered, denying generally the claim of petitioner, and setting up affirmative reasons why it should not be allowed. Thereafter these matters were set down for hearing, and also, at the same time, the accounts of Boeck and Wakefield as executor and administrator were set for hearing, and due notice of such hearing given. On the 14th of February, 1901, the following order was entered:

"On this 14th day of February, 1901, this cause coming on regularly for hearing by the court, on the petition of L. B. Nash to be allowed attorney's fees for services rendered said estate on the employment of one Carl Boeck, a former executor of said estate, W. J. C. Wakefield, as administrator *de bonis non* of said estate, objecting to the introduction of any testimony on behalf of the said petitioner upon the ground that the court in the probate department had no jurisdiction to hear and try said question upon the petition of said Nash alone, and that said petition did not state facts sufficient to constitute any cause of action, and that said Boeck had filed his statement of account and that said matter should come up as a part of his

Dec. 1902.]Opinion Per Curiam.

proceeding, and the court having reserved the ruling upon said objection, and testimony having been introduced on behalf of the said petitioner; the said W. J. C. Wakefield, as administrator *de bonis non* moved to dismiss the said petition upon the same grounds heretofore stated, and the court having reserved the ruling upon said motion to dismiss said petition, and the said Wakefield having begun the introduction of testimony in support of the defense of his answer, and the question being again brought before the court as a result of an objection made by said petitioner, and the court having fully heard the argument of counsel upon said objection, and upon said motion to dismiss, and being fully advised in the premises, the said motion to dismiss the said petition of L. B. Nash is hereby sustained. And at the same time the said L. B. Nash, by his counsel, having moved the court for judgment for the full amount claimed by said L. B. Nash, to-wit: the sum of \$10,000, upon the evidence adduced by him in support of his said petition the said motion for judgment is hereby denied, and the said petition is hereby dismissed."

To this order petitioner at the time excepted, gave notice of appeal therefrom, filed his appeal bond, and brought here the record in probate to and inclusive of this order. From the supplemental record brought up by the respondent it appears that on the same day, and filed at the same time, was the following order:

"On this 14th day of February, 1901, this cause came regularly on for hearing by the court on application of Carl Boeck to file an amendment to his account as executor, and after hearing said application and the argument of counsel, and the court being fully advised in the premises, it is by the court ordered that said application be, and the same is hereby, continued to the 12th day of March, 1901, at 9:30 o'clock a. m. of said day."

On the 18th of February following, Boeck filed his amended final account, as directed in the order above set

forth, setting out his contract with Nash for attorney's services, and requesting the allowance of their reasonable value. On the 4th of June, 1901, the court settled the final account of Boeck, and made this finding:

"That one L. B. Nash, an attorney practicing in this court, performed services in matters of said estate at the request of said Carl Boeck of the reasonable value of five hundred dollars (\$500), no part of which has been paid; that the total value of all services performed by said Nash is said sum aforesaid, and neither said Nash or said Boeck are entitled to any or greater sum on account thereof to be paid out of the funds of said estate; that due and sufficient notice and opportunity was given said Nash before and at said hearing to prove and establish any and all claims for his said services."

Thereupon the court ordered:

"Now, therefore, it is hereby ordered that said W. J. C. Wakefield, as administrator of said estate, pay to said Carl Boeck the sum of three thousand dollars (\$3,000), and that he pay in addition thereto the sum of five hundred dollars (\$500), either to said Boeck for the benefit of said Nash, or to said L. B. Nash, and that said payments shall be in full satisfaction of all claims and demands of every kind and character for executor's fees, wages, commissions, services, salaries, and all remuneration of every kind to be paid out of said estate for said parties and each of them, and that he take from said Carl Boeck, upon making such payments, a full release, satisfaction, and discharge signed by him; and if he pay said sum of five hundred dollars (\$500) to said Nash, that he also take from said Nash full satisfaction and discharge of all claims signed by him, and that he file said releases and satisfactions in the above entitled cause."

The respondent moves that the appeal be dismissed on the grounds that it is not from a final order in the probate procedure, and because the controversy is settled therein by

Dec. 1902.]

Opinion Per Curiam.

final judgment of the court. Counsel have discussed with much ability the right of the attorney to directly present his claim for allowance in the event of a difference between the attorney and the administrator or the refusal of the administrator to present the same, but, in view of the record here, such question does not become material. Section 6312, Bal. Code, provides that the administrator or executor shall be allowed all necessary expenses of administration. Under this provision it is not seriously questioned that the judge in the probate procedure must allow the executor or administrator for necessary and reasonable counsel and attorney's fees. This is the same whether the estate be administered by an administrator appointed by the court or an executor or administrator under direction of a will, such as appears in the record. The general rule seems to be correctly stated in 11 Am. & Eng. Enc. Law (2d ed.), p. 1240, as follows:

"An executor or administrator has the right, unless restricted by statute, to employ counsel whenever it is necessary or proper, to protect the estate, or to enable him to manage it properly, and on the settlement of his accounts he will be allowed credit, as part of the expenses of administration, for the reasonable charges paid by him for such services."

It is equally well settled that such employment of an attorney is in the first instance a personal contract between the executor or administrator and the attorney, but the allowance of such claims against the estate must be made by the court. The matter then pending before the court was the allowance of this claim for counsel fees. The court had jurisdiction of the subject-matter—the claim—at the time. It was before the court in each the petition and the answers of the executor and the administrator and in their final accounts. The only contention, seemingly, that

arose was merely upon the order of hearing. All parties interested were in court. The order appealed from does not imply any final determination of the attorney's claim, but does imply a further hearing of such claim on the final account of the executor Boeck, the executor who made the contract. The usual and ordinary procedure is the hearing and allowance of such claims on the final accounting of the administrator or executor. It appears from the record that both orders referred to were made on the same day and filed at the same time, and it appears that the final order of the court allowing the claim was made when the petitioner was offered the opportunity to produce any proof of the claim. From the whole record, therefore, it appears that the order appealed from was not final. The proceeding was still pending, and the claim was before the court for adjudication, with all parties interested therein duly notified. Such final determination was made in the order of June 4, 1901, from which no appeal is taken. No statement of facts or bill of exceptions is here, and upon the transcripts before us the motion to dismiss must be sustained.

Dismissed.

[No. 4815. Decided December 30, 1902.]

T. M. DAULTON, *Respondent*, v. R. C. STUART, *Appellant*.

ACTION TO DETERMINE CONFLICTING CLAIMS TO PROPERTY — SUFFICIENCY OF COMPLAINT.

Bal. Code, §§ 4843-4845, which provide for actions to determine conflicting claims to property, do not require the complaint to allege that plaintiff has been sued or suit threatened, or that he is in danger of having judgment rendered against him twice for the

Dec. 1902.] Opinion of the Court—MOUNT, J.

same property, but any allegation which shows the fact that each of two different parties claims the property is sufficient.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

H. E. Foster, for appellant.

W. D. Lambuth, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This action was brought by the respondent under § 4843, Bal. Code. A complaint was filed, in which it was alleged substantially that the respondent was in possession of certain described household goods, which were purchased of him by Mrs. George Henderson; that, at the time of the purchase, Mrs. Henderson paid \$100 on the purchase price; that thereafter Mrs. Henderson came to respondent's place of business in company with appellant R. C. Stuart; that Stuart thereupon paid the balance of the purchase price of the said goods, which were to be shipped to Alaska, as directed by defendant Henderson; that defendants Stuart and Henderson now both claim ownership of the goods; that respondent is ignorant of the respective rights of the defendants, and has no claim upon the goods, and is ready and willing to deliver them to such persons as the court may direct; that the action is not brought by collusion with either of the defendants, but by reason of the fact that defendants are both about to commence replevin suits against respondent for the goods. The prayer was for injunctive relief, that the defendants be required to interplead, that the court appoint some person to take possession of the property *pendente lite*, that plaintiff be discharged from liability, and for general relief. The court thereupon made an order requiring the defend-

ants to be served with summons, and that plaintiff remain in possession of the property subject to the further order of the court. Appellant, Stuart, was thereafter served, and appeared in the action and filed a motion to set aside the order. This motion was denied, but respondent was granted leave to file an amended complaint, which is in substance the same as the original complaint, except the following paragraph, which was added, viz:

“7. That plaintiff is a merchant doing a large business, and that any suit commenced by the defendants or either of them will damage plaintiff in his credit and standing, and cause him to be reported by the various mercantile agencies as being sued, and work irreparable injury to plaintiff's credit; that plaintiff would have to pay a considerable amount for attorneys' fees to defend such action, in addition to taxable costs of court, for which expenditure plaintiff would have no recourse; that plaintiff offered before the commencement of this action to deliver all of the said property to the defendant, Stuart, provided he would give plaintiff a proper indemnifying bond, but that said defendant refused to give any bond, or otherwise indemnify plaintiff.”

Appellant, Stuart, thereupon filed a general demurrer to the amended complaint. This demurrer was denied upon the hearing, and appellant elected to stand upon his demurrer and refused to plead further. Judgment was thereupon entered against him restraining him from bringing any action against respondent to recover the property, or for damages for detaining possession thereof, and directing him to deliver the property to defendant Henderson.

The questions presented on this appeal go to the sufficiency of the complaint. It is argued that the complaint is insufficient, because it does not show that suit is threatened, or that respondent is in danger of having judgment

Dec. 1902.] Opinion of the Court—MOUNT, J.

rendered against him, or that he may be called upon to respond to each of the claimants for the same property or its value. The sections of the statute under which the action is brought are as follows:

“Sec. 4843. Any one having in his possession, or under his control, any property or money, or being indebted, where more than one person claims to be the owner of, entitled to, interested in, or to have a lien on such property, money or indebtedness, or any part thereof, may commence an action in the superior court against all or any of such persons, and have their rights, claims, interest, or liens adjudged, determined, and adjusted in such action.

“Sec. 4844. In all actions commenced under the preceding section, the plaintiff may disclaim any interest in the money, property, or indebtedness, and deposit with the clerk of the court the full amount of such money or indebtedness, or other property, and he shall not be liable for any costs accruing in said action.

“Sec. 4845. Either of the defendants may set up or show any claim or lien he may have to such property, money, or indebtedness, or any part thereof, and the superior right, title, or lien, whether legal or equitable, shall prevail. The court, or judge thereof, may make all necessary orders, during the pendency of said action, for the preservation and protection of the rights, interests, or liens of the several parties.”

These sections do not require that, before the action can be maintained, plaintiff shall allege that he has been sued or suit threatened, or that he is in danger of having judgment rendered against him twice for the same property, unless it is found in the clause in § 4843, as follows: “where more than one person claims to be the owner” of such property. The word “claims,” as used in this section, has its ordinary signification, and is readily understood. No doubt an allegation that each of two persons had sued or threatened suit against the plaintiff would be

a good allegation of the fact that each made a claim of ownership; but we do not think such allegations are exclusively necessary. Any allegation which shows the fact that each of two different parties claims the property is sufficient. The language of the complaint is as follows:

“2. That said defendant Stuart now claims ownership of said goods under claim that he furnished all the money for the purchase of the same, and that he actually made the purchase for himself, and demands delivery of said goods to him at Seattle.

“3. That defendant Henderson also claims the ownership of the same by reason of her purchasing the same as aforesaid.

“4. That plaintiff is ignorant of the respective rights of the defendants.

“5. That the plaintiff has no claim upon the said property, and is ready and willing to deliver it to such persons as the court may direct.

“6. That this action is not brought by collusion with either of the defendants, but by reason of the fact that the defendants are each about to commence replevin suits against plaintiff for said goods.”

These allegations show that the defendants claim adverse ownership; that the defendant Stuart claims to own the goods, and has made a demand for the same; that defendant Henderson also claims ownership, and that this action is brought because each of the defendants is about to commence a replevin suit against plaintiff for the goods. They are sufficient to bring the case within the statute upon the question raised, and it was, therefore, not error to overrule the demurrer.

The judgment is affirmed.

REAVIS, C. J., and ANDEES, FULLERTON and DUNBAR, J.J., concur.

[No. 4368. Decided December 30, 1902.]

**GEORGE E. CLANCY, *Appellant*, v. JAMES F. McELROY,
Executor, *Respondent*.**

EXECUTORS — FAILURE TO FILE INVENTORY — REMOVAL — DISCRETION OF COURT.

Bal. Code, § 6208, authorizing the court to revoke letters testamentary, where the executor fails to file his inventory of the estate within the period prescribed by statute, or within such further time, not exceeding three months, as the court shall allow, is directory instead of mandatory, and the authority of the court to remove in case of a failure of the executor to comply rests in its sound legal discretion.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Root, Palmer & Brown, for appellant.

John B. Hart, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Thomas Clancy died testate in King county, leaving a valuable estate. In the will nineteen legatees received bequests, among whom was the appellant, who received \$15,000. The will appointed the respondent executor, who thereupon duly qualified and received his letters as such executor. The appellant thereafter instituted this proceeding to remove the executor, and prayed that some suitable person might be appointed administrator of the estate to administer the same under the provisions of the will. The cause for such removal, upon which the case is brought here for review, was failure of the executor to file the inventory of the estate within the time prescribed by § 6201, Bal. Code, which reads as follows:

"Every executor and administrator shall make and return, upon oath, into the court, within one month after his appointment, a true inventory of the real and personal estate of the deceased, which shall come to his possession or knowledge."

The facts, as they appeared on the hearing, were that the executor secured an order extending the time for filing the inventory for thirty days; that he, within the extended time, made out and verified such inventory, but, through accident and inadvertence, such inventory was not formally filed in the court until after the time prescribed for filing the same by the statute had lapsed; that after the commencement of this proceeding, and upon notice of the same, the executor immediately filed the inventory, which had been so prepared and verified. Section 6208, Bal. Code, provides as follows:

"If any executor or administrator shall neglect or refuse to return the inventory within the period prescribed, or within such further time, not exceeding three months, as the court shall allow, the court shall revoke the letters testamentary or of administration; and the executor or administrator shall be liable on his bond to any party interested for the injury sustained by the estate through his neglect."

Appellant urges that this section is mandatory, and no discretion is vested in the superior court as to the removal of the executor when he has failed to file the inventory within time. This is the only question presented for consideration. No such statutory provision in the same terms has been brought to our attention; but it is a familiar rule of statutory construction that the spirit as well as the letter must be considered in determining whether its provisions are mandatory or directory. The words "may" and "shall" may be used according to the context and intent found

Dec. 1902.]

Syllabus.

in the statute, and are frequently construed interchangeably. From the reading of these two sections in connection with the received construction and nature of probate procedure and the ordinary discretion of the superior court in such proceedings, it is concluded that the authority of the superior court to remove the executor in this case rests in a sound legal discretion. Considering that the failure of the executor to formally file the inventory was through mere inadvertence and forgetfulness, and the further fact that he was the trustee selected by the testator, and otherwise competent to manage the estate, no abuse of discretion is perceived in the court's ruling.

Affirmed.

DUNBAR, FULLERTON, MOUNT and ANDERS, J.J., concur.

[No. 4369. Decided December 30, 1902.]

ELZIE N. HOWE, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.

REMOVAL OF CAUSE — SEASONABLENESS OF APPLICATION.

Where the resident defendants to an action are dismissed from the case, only at the close of the introduction of testimony and in opposition to plaintiff's contention, an application at that time by the remaining non-resident defendant for removal of the cause to the federal court is not seasonably made.

MASTER AND SERVANT — TORTS OF SERVANT — JOINT LIABILITY.

An action for tortious negligence may be maintained against the master and his employee jointly, where the injury was caused by the act of the latter (*Doremus v. Root*, 23 Wash. 710, distinguished).

SAME — FELLOW SERVANTS — FIREMEN AND CONDUCTORS.

The fireman and conductor on a train are not fellow servants, but the conductor stands as a vice-principal, for whose negligence

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30	569
33	534
30	569
34	70
30	569
41	347
30	569
42	133

Opinion of the Court.—DUNBAR, J. [30 Wash.

the railway company is liable, where injury results therefrom to the fireman.

SAME — CONCURRING NEGLIGENCE.

Where the negligence of the master contributes to the injury of a servant, the master is liable, though the negligence of a fellow servant may be contributory.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Affirmed.

Stephens & Bunn, for appellant.

Barnes & Latimer and *Hyde, Townsend & Tompkins*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is a personal injury case. On the 2d of January, 1899, the respondent was fireman on train No. 13, a mixed passenger and freight train running from Cheney to Coulee City. On this day a snowplow train had been sent ahead of the passenger train to clear the road and prepare the track for the passenger train, and at a point about six miles west of Almira, a station between Cheney and Coulee City, No. 13, upon which respondent was firing the lead engine, ran into the snowplow, and respondent was injured by the collision to such an extent that his leg had to be amputated. Suit for \$25,000 damages on account of his injuries was brought by the respondent against the Northern Pacific Railway Company, which was operating the trains above spoken of. Respondent joined as defendants with the railway company Frederick W. Gilbert, who was at the time the superintendent of the division of the railroad upon which plaintiff was working, and A. G. Kamm, who was the chief dispatcher employed by the railroad of the division before mentioned. The trial of the cause resulted in a verdict for respondent

Dec. 1902] Opinion of the Court.—DUNBAR, J.

for \$15,000, against the railway company alone, Kamm and Gilbert having been dismissed from the case by the court at the end of all the testimony. Judgment was entered upon the verdict, and from such judgment this appeal was taken.

The statement of the case by the appellant is very expansive and minute in detail, but we think we have stated sufficient to settle the propositions necessary for the determination of the cause. The complaint alleged negligence in the company in failure to promulgate and enforce ample and sufficient rules for the running of the trains; failure to provide proper machinery and appliances; in running defective locomotives and engines; that the same were unskillfully equipped, manned, and fitted out; failure to furnish competent servants; an insufficient number of servants; negligently ordering train No. 13 to proceed westerly from Almira station to Coulee City on the night in question; and various other allegations of negligence, and failure on the part of Gilbert and Kamm to prepare, publish, and enforce all necessary rules, regulations, and orders for the running and operation of their trains. A joint demurrer of the defendants was interposed to the complaint on the ground of misjoinder, which was overruled, and on this ruling is based one of the assignments of error.

It is contended by the appellant that there is no joint liability between the railway company and the dispatcher and the division superintendent; that the master cannot be liable together with any of its employees joined in an action based upon charges of this character; and it is insisted that this court has decided this question in favor of appellant's contention in *Doremus v. Root*, 23 Wash. 710 (63 Pac. 572, 54 L. R. A. 649). But we do not

so understand the decision in that case. There the action, brought against the railroad company and Root, was based exclusively upon the alleged negligence of Root while acting as conductor of one of the railroad company's freight trains, the respondent in that case being fireman and Root conductor on the same train. The jury returned a verdict finding for the plaintiff and against the defendant railroad company, and assessed the damages of the plaintiff at \$15,000. After the verdict was read, and before the jury was discharged, the attorney for defendant Root inquired of the court what construction the court would place upon the verdict with respect to defendant Root, and the court ruled that said verdict was, and should be considered as, a verdict in favor of defendant Root. The verdict was then recorded and the jury discharged. Afterwards a judgment was entered in favor of Root and against the plaintiff for costs, and judgment was finally entered against the railroad company for the amount of the verdict, with costs to the respondent. This court held in that case that, inasmuch as the negligence of the railroad company was alleged to be the negligent action of the servant, and the jury having affirmatively found that the servant was not negligent, it must follow that there was no negligence on the part of the master, the railroad company; and that, as there had been no appeal from the judgment in favor of the servant, the cause could not be retried, and it was, therefore, ordered dismissed. In so far as the decision in this case and the discussion leading up to it are concerned, the particular question involved here was not involved in that case, nor attempted to be decided. If, however, any inference is to be drawn from the decision in that case, it is opposed to appellant's contention, for at the threshold of the case the question of non-joinder was

Dec. 1902] Opinion of the Court.—DUNBAR, J.

raised and vigorously discussed in appellant's brief, and, if the court had concluded that the appellant's contention was right on that jurisdictional question, it would not have been necessary to have examined or decided the subsequent point upon which the court's decision was based. On this question, however, there is a square conflict of authority, and we have examined it with reference not only to the cases which are cited in appellant's brief, but with reference to the cases cited in the brief of the appellants in the case of *Doremus v. Root, supra*.

Section 242 of Shearman & Redfield on the Law of Negligence (5th ed.), is cited to support the contention that the master and servant cannot be joined. This and the succeeding section are in reality a discussion of the principle involved in the distinction that has been raised by some courts between the liability of an agent in case of nonfeasance and that of one in case of misfeasance; but in § 248 the rule is thus stated under the title, "Joint Liability of Master and Servant":

"Wherever a master can be held responsible for the tortious negligence of his servant, the two are generally held jointly as well as severally liable; and if a servant employs a sub-agent, under such circumstances that both the original master and the intermediate employer are liable for the negligence of the sub-agent, they are all jointly and severally liable;"

citing several cases but stating that a different rule prevails in Massachusetts, and probably in Maine. The theory of the cases holding that there can not be a joint liability is that there is really but one act of negligence; that the negligence can be imputed to the master, not by reason of his being a joint tortfeasor, but by reason of his peculiar relation to his agent; and that public policy holds him responsible for the agent's acts under the doc-

trine of *respondeat superior*; and it seems that theoretically there may be something in this idea. Many of the cases, however, base their opinions upon the old distinction which we have spoken of between a case of misfeasance and one of nonfeasance, a distinction which this court, in *Lough v. Davis & Co.*, *ante*, p. 204 (70 Pac. 491), held not to be sound, either on reason or on authority. Without specially reviewing the cases on this subject, which are collated in *Warax v. Cincinnati, etc., Ry. Co.*, 72 Fed. 637, in which the right to join the master and servant is denied, there are cited, as sustaining the affirmative of the proposition: *Wright v. Wilcox*, 19 Wend. 343 (32 Am. Dec. 507); *Suydam v. Moore*, 8 Barb. 358; *Montfort v. Hughes*, 3 E. D. Smith, 591; *Phelps v. Wait*, 30 N. Y. 78; *Wright v. Compton*, 53 Ind. 387; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225 (63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911); *Newman v. Fowler*, 37 N. J. Law, 89.

In support of the view that the master can not be joined as defendant in an action against his servant for negligence, where the master is not personally concerned in the negligence either by his presence or express direction, the following are cited: *Parsons v. Winchell*, 5 Cush. 592 (52 Am. Dec. 745); *Mulchey v. Methodist Religious Society*, 125 Mass. 487; *Clark v. Fry*, 8 Ohio St. 358 (72 Am. Dec. 590); *Seelen v. Ryan*, 2 Cin. R. 158; *Campbell v. Portland Sugar Co.*, 62 Me. 553 (16 Am. Rep. 503); *Beuttell v. Chicago, M. & St. P. Ry. Co.*, 26 Fed. 50; *Page v. Parker*, 40 N. H. 47; *Bailey v. Bussing*, 37 Conn. 349. Other cases have been decided since with equally conflicting results.

But without entering into a discussion or an analysis of these conflicting opinions, considering the fact that uni-

Dec. 1902] Opinion of the Court.—DUNBAR, J.

versal authority will hold responsible in independent actions both the master and the agent or servant whose tortious act is the cause of the injury, and the holding of this court that as to the liability of the servant or agent there is no distinction between cases of misfeasance and those of nonfeasance, and in further consideration of the reformed procedure which obtains in this state, we are inclined to hold with those cases which permit the rights of all parties to be determined in one action, thereby discountenancing and rendering unnecessary a multiplicity of suits, rather than to compel the plaintiff to pursue and exhaust his remedy against one actor, and then, if compensation can not be realized for the damage sustained, to proceed against another. We think this view is more in harmony with the spirit of our Code and modern procedure generally. It is therefore held that no error was committed by the court in overruling the defendant's demurrer to the complaint.

The next pertinent claim is that the cause should have been removed to the federal court upon the application which was made and the bond which was offered when Kamm and Gilbert were dismissed from the case. We do not think this contention can be sustained. It is true, under the authorities, if the application is made seasonably, it should be granted, even though it was not made at the commencement of the trial, as was decided in *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92 (18 Sup. Ct. 264), cited by appellant. In that case, however, the plaintiff discontinued as to the resident defendants when the cause was called for trial; but in the case at bar it was the request of the defendants themselves that brought about their dismissal, in opposition to respondent's contention. This question is distinctly settled in *Whitcomb v. Smithson*,

175 U. S. 635 (20 Sup. Ct. 248), a late case, decided in January, 1900, and one which seems to us to be exactly in point. In answer to the proposition urged here, the court in that case said:

"This might have been so if when the cause was called for trial in the state court plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants;"

citing *Powers v. Chesapeake, etc., Ry. Co., supra.*

"But," said the court, "that is not this case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled *in invitum*. . . . The case was prosecuted by plaintiff accordingly, and at the close of the evidence a motion was made to instruct the jury to return a verdict in behalf of the railway company because the evidence did not sustain the allegations of the complaint as to the negligence of that defendant, and the court granted the motion on that ground in view of the rules of the company, which it found 'to amply cover all the contingencies arising in the prosecution of the various duties incident to railroad service at the point.' This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried."

We think this case is decisive of the question raised, and that no error was committed by the court in refusing to transfer the case to the federal court.

We have examined the record in detail, and, although

Dec. 1902] Opinion of the Court.—DUNBAR, J.

it is voluminous, we have been unable to discover any reversible error, either in the admission or rejection of testimony, or in the giving or refusing to give instructions. But even if slight error had crept into some of the proceedings in relation to the proof of negligence, we think, under the theory of the appellant, that it would not have been prejudicial, and that the court would have been justified in instructing the jury that negligence had been proven. It is settled law that a rear-end or head-end collision is *prima facie* the result of negligence, where the rights of passengers and of railroad companies are in controversy. If any different rule obtains in a litigation between the railroad company and an employee who is injured, it must be upon the theory that the employee is in some way responsible for the negligence, either through contribution on his part or contribution by a fellow servant. It is conceded and asserted in this case that the conductors on both the trains, viz., the passenger train No. 13 and the snowplow train, were guilty of negligence, and that the accident would not have happened had it not been for such negligence. After discussing the rules which provide the duty incumbent upon the conductor to use certain precautions in cases of this kind, and referring to the fact that train No. 13 left Almira only ten minutes after the snowplow train, and the assertion that the officers are charged by the rules with the duty of assuming that another train is coming when their train is delayed; that explosive caps or torpedoes are provided for placing upon the tops of the rails as signals to be used in addition to the regular signals; and many other precautionary provisions, the appellant says:

"It is shown by the record that trains very often lose time or actually have to stop between stations. This has

been true ever since railroad trains commenced running, and because of this all trains were equipped, as this snowplow train was equipped, with appliances to protect them ahead and in the rear. These appliances are so effective and so easily used that there is no occasion and no reason for a rear-end collision of this sort, except in the instance where the train crews are wholly negligent and careless in the use of the signals, or in the entire failure to use them. It will be noted that there was no careless or negligent use of the signal appliances which were on this snowplow train. They had the appliances, they had torpedoes, they had fuses, and they had lanterns; but, instead of there being a negligent or careless use of them, they did not use them at all. Any one of these signals would have avoided a collision or accident of this sort. A torpedo placed on the track, even though there be but one, is a signal for any following train to stop until it has burned out. . . . There was a conductor on the train, who could have done these things. There was a rear brakeman on the train, who could have done these things; and every single one of these men knew and must have known that train was losing time from the moment that it left Almira; and every one of these men knew and must have known that a fast running passenger train was behind them running in the same direction. It is almost inconceivable under such circumstances, and almost impossible to believe, that these appliances for their protection were not used; but they were not, and thus the injury was caused."

Like negligence is attributed by the appellant to the managers of both the snowplow train and the passenger train. This charge must be made upon the theory that the fireman was a fellow servant with the conductor of the train, and that, therefore, the negligence of the conductor was the negligence of the fireman. We cannot conceive that it is the duty of the fireman to assume or know that the conductor has not done his duty,—a duty so plain and palpable as is charged upon him by the appellant in this

Dec. 1902] Opinion of the Court.—DUNBAR, J.

case; or that he is to leave his box and establish a surveillance over the conductor and other operators of the train. Such conduct on his part would not only be unbecoming or intolerable, but, if tolerated, might lead to the gravest results. There must be some one in control of trains of cars while in transit. There must be some directing mind, some particular person in whom responsibility is lodged; and it would lead to most disastrous confusion if the practice obtained to confer responsibility and directing power equally and miscellaneous upon conductors, brakemen, engineers, firemen, and other operators of a railroad. The proof of such a practice would be the strongest proof of negligence. But it may be confidently asserted that no such practice prevails. It is matter of common knowledge that the conductor of a train under ordinary circumstances is the controlling power. His official title indicates it; and the assumption of the master's authority by him, together with the actions of the company towards him, proves it. As was pertinently said by the supreme court of the United States in *Chicago, etc., Ry. Co. v. Ross*, 112 U. S. 377 (5 Sup. Ct. 184):

“The conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.”

But, whatever may be said of the doctrine of fellow servants in other jurisdictions, under the uniform holdings and announcements of this court the fireman on this train cannot be held to be a fellow servant of the conductors on

both or either of the trains which collided, and the negligence which led to this collision is proven upon both equally. The negligence of the company was so overwhelmingly proven in many instances in this case that, even if there had been negligence on the part of some one who might be construed to be a fellow servant of the respondent, the appellant would not thereby be relieved of its responsibility. *Northern Pacific R. R. Co. v. O'Brien*, 1 Wash. 599 (21 Pac. 32).

It is uniform authority that, if negligence of the master contributes to the injury, he is liable, even though the negligence of a fellow servant was contributory. *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700 (1 Sup. Ct. 493). This principle has been uniformly followed by this court, and was again announced in *Ralph v. American Bridge Co.*, ante, p. 500, where it is said:

"It is also well settled that if the negligence of a fellow servant concur with the negligence of the master, it does not excuse the primary negligence of the master for injury to another fellow servant."

An investigation of the whole case convinces us that no substantial error was committed in any respect. The judgment is therefore affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

MOUNT, J., being disqualified, did not take part in this decision.

Dec. 1902.]Opinion Per Curiam.

[No. 4160. Decided December 31, 1902.]

L. B. NASH, *Appellant*, v. W. J. C. WAKEFIELD, *Administrator*, et al., *Respondents*.

JUDGMENTS — RES JUDICATA — ALLOWANCE OF ATTORNEY FEES IN PROBATE PROCEEDINGS.

Where the superior court sitting in probate has passed upon the claim of an attorney for fees for services rendered the executor of an estate, and has rendered judgment thereon, such judgment in the probate proceeding is a bar to a civil action by the attorney against the estate for the recovery of the value of his services.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Affirmed.

James Dawson, R. E. Porterfield and L. B. Nash, for appellant.

F. T. Post, for respondents.

PER CURIAM.—Plaintiff commenced this suit to recover for services as attorney and counselor for the executors of the Gorkow estate. The substantial allegations of the complaint deemed material for consideration on this appeal are that Gorkow died testate in the county of Spokane, possessed of a large estate, consisting principally of a valuable brewery plant and the business connected therewith in the city of Spokane; that by his will he made various devises to legatees in Spokane, and the residue of the estate was devised to heirs in Germany. Deceased appointed two executors, and among other powers conferred in the will were the following:

“I hereby appoint my employees, August Mueller and Carl Boeck, in each of whom I have the fullest confidence, as the executors of my last will and testament, and for the

purpose of carrying out the intentions and provisions of this my last will and testament, I hereby order and direct them, and the survivor of them, to sell and convert into money all of my estate, both real and personal and mixed, and wheresoever the same is situated, with full power to sell any and all of my estate and property without order of the court, either at public or private sale, with or without notice, as the executors or survivors of them may determine, and to give and execute proper acquittances and deeds for any and all property that may be sold."

The executors were also given full power and control over the brewery business, with direction to continue the same until the sale of the property, and were authorized to employ counsel for the estate when the executors deemed it desirable. One of the said executors, Carl Boeck, entered into a written contract with plaintiff, under the terms of which plaintiff was engaged as sole counsel for said estate, and for such services the compensation was stipulated. Afterwards the two executors under the will were removed in the probate procedure, and the defendant Wakefield was appointed as administrator *de bonis non*. It is alleged that the executor Carl Boeck refused to allow the claim of the plaintiff, or to present the same in court for allowance, and that said Boeck was insolvent; that the claim of plaintiff had been duly presented to the administrator, Wakefield, who was in possession of all the assets of the estate, for his allowance, and that said Wakefield had formally rejected plaintiff's claim. The complaint prayed that the administrator, Wakefield, be enjoined from further proceeding in the final settlement of the estate until plaintiff's claim be satisfied, and that judgment be entered thereon against Boeck and Wakefield for the amount of the claim, and that the same be declared a lien on the estate in the possession of Wakefield as administrator. The answers of the respective defendants, after

Dec. 1902.]Opinion Per Curiam.

denials of the material averments of the complaint, each set up substantially one defense as follows: That plaintiff had duly filed his claim for counsel fees in the probate procedure, and that such proceedings were then had upon a full hearing, with all parties before the court, upon said claim, that the court entered its judgment thereupon determining the validity and amount of such claim. The court sustained this defense, and dismissed the action.

If this defense be valid, it must determine the present case. Upon this issue of the adjudication of the claim in the probate procedure, the court found:

"That long before the commencement of this action this plaintiff filed a petition in this court, in cause No. 1115, being the matter of the administration of said estate, setting forth in said petition said contract, and making substantially the same allegations as to services rendered as are made in the complaint herein, and praying that the administrator of said estate be directed to pay him said sum of \$10,000 out of the assets of said estate, said petition being filed May 28, 1900. That a citation was issued thereon, under order of the court, and said administrator, both by motion and demurrer, objected to the jurisdiction of the court to determine the said matter upon the petition of an attorney alone, and contending that the matter should be presented upon the petition of said Carl Boeck, as executor, and said administrator also filed an answer to said petition. That said Carl Boeck also, in said cause No. 1115, filed his claim and petition for allowance and for his discharge, to which said administrator filed an answer, and said matters came on for hearing on the same day, to-wit: In January, 1901. That when said matters were called for hearing, said administrator moved that said two matters be consolidated and tried as one, to which said Boeck, through his attorneys, offered to consent in open court, but this plaintiff, through his attorneys, objected thereto, and said motion was denied. That thereupon said administrator moved the court to treat

the claim and petition of this plaintiff as an amendment to, or as a part of, the claim of said Boeck, and as a part of his final account, which was objected to by this plaintiff, and which said Boeck, through his attorneys, offered to consent to, but the same was denied. That accordingly some evidence was heard upon the matters and things set forth in the petition of this plaintiff, over the objection of said administrator, and, finally, the court decided on February 13, 1901, that the objections made by said administrator were well taken, and entered an order dismissing the petition of this plaintiff, but before said order was actually made said administrator again offered in open court to have the petition of this plaintiff treated as an amendment to the claim and account of said Boeck and heard and be tried as a part thereof, and that the said matter proceed upon the testimony already introduced, and such testimony as might thereafter be properly introduced by either party, to which said Boeck offered to consent in open court, but this plaintiff objected. That upon the entering of the order dismissing the plaintiff's petition, and in open court, and in the presence of the plaintiff and his attorneys, said Boeck asked leave of the court to amend his claim and account so as to incorporate therein the said claim of this plaintiff, and the court, in said matter, thereupon made an order allowing said amendment, in the presence of this plaintiff and his attorneys, and ordered notice to be given, and adjourned the whole matter until March 12, 1901. That this plaintiff on the next day, February 14, 1901, commenced this action by service of summons. That said Boeck had never been requested by the plaintiff to put his claim in the account and claim of said Boeck, and said Boeck had never refused so to do. That there never was any collusion whatsoever concerning the claim of this plaintiff, between said Boeck and said administrator. That the said Mueller, before the commencement of this action, also filed his claim and final account in said matter and the same has not yet been determined. That on February 16, 1901, said Boeck, on behalf of himself and said Mueller, amended his said claim and account and included

Dec. 1902.]Opinion Per Curiam.

therein the claim of said Nash; caused notice thereof to be given in the manner provided by law, and served personal notice upon this plaintiff of said matter, and requesting this plaintiff to introduce his evidence upon the subject of the compensation that he claimed that he was entitled to in said cause and matter, when the same came on for hearing. That both of said matters were set for hearing before this court and the same judge thereof on the following days, to-wit: This cause on the — day of April, 1901, and the cause in probate on the — day of April, 1901. That this cause was taken under advisement by the court, and, before decision was rendered therein, the cause in probate was heard by the court and upon the trial of said cause in probate all of the evidence and testimony introduced upon the trial of this cause was, by the stipulation of the attorneys for said Boeck and for said administration, introduced in evidence, subject to the objections theretofore made, and other evidence was also introduced, and said court in said cause has rendered a decision in the said matter in probate, as to the allowance to be made for and on behalf of said Nash, for any and all services rendered."

These findings are challenged by appellant as not supported by the evidence. On a careful review of the testimony in the record we think the exceptions cannot be sustained, and that the findings ought not to be disturbed here.

Both under the provisions of the will before us and by the provisions of our statutes, the necessary counsel fees are chargeable against the estate. The contract between the plaintiff and the executor, Boeck, was in the first instance a personal one with the executor. However, such executor was entitled to have the reasonable value for such services allowed him by the court. Ample power is vested in the court in its probate procedure to hear and determine such claims, and, when proper parties are heard, its adjudication is conclusive. In view of the premises, it is unnecessary to review the other questions argued by counsel.

The findings of fact above set forth show that the claim for counsel fees set forth in the complaint was determined by the same court on the same testimony while sitting in probate. Such adjudication must be final, and cannot be reviewed in this suit.

The decree is affirmed.

[No. 4335. Decided December 31, 1902.]

JAMES DUNSMUIR, *Respondent*, v. PORT ANGELES GAS,
WATER, ELECTRIC LIGHT AND POWER COMPANY *et al.*,
Appellants.

JUDGMENTS — RES JUDICATA — DENIAL OF PLAINTIFF'S LIEN FOR TAXES — EFFECT ON RIGHT TO SUBROGATION.

The judgment in an action to determine the priorities between mortgagees of the same property which expressly decided that plaintiff had no lien for taxes paid by him, because the property was personalty instead of realty, and the statute afforded the mortgagee a lien when he paid taxes on real estate only, is not a bar to a subsequent action between the same parties involving the same taxes, where the subsequent action seeks to recover the amount of the taxes paid by plaintiff as a prior mortgagee and to have the amount paid adjudged a lien on the property, and that he be subrogated to the rights of the county in the enforcement of such lien.

SUBROGATION — PAYMENT OF TAXES BY MORTGAGEE.

Where one in good faith, in the belief that he has a valid lien on certain personal property, pays delinquent taxes thereon in order to protect his supposed lien, he is entitled to be subrogated to the rights of the county to the extent of the taxes paid, with interest thereon at the legal rate, but is not entitled to collect the penalties provided by statute.

Appeal from Superior Court, Pierce County.—Hon. THAD HUSTON, Judge. Affirmed.

Ira Bronson, for appellants.

W. L. Marquardt and J. J. Anderson, for respondent.

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

The opinion of the court was delivered by

REAVIS, C. J.—Plaintiff seeks to recover from defendants the amount of certain taxes levied in the years 1892, 1893 and 1894 on a system of waterworks then owned by the two first-named defendants in Clallam county, and to have the amount so paid adjudged a lien on said property, and that he may be subrogated to the rights of the county in the enforcement of said lien. The material findings of fact by the court are as follows:

“(3) That on or about the 21st day of February, 1891, the Port Angeles Gas, Water, Electric Light & Power Company, Limited, was indebted to the plaintiff in the sum of \$20,000, and executed and delivered to him its promissory note for the said sum, and secured the same by a mortgage upon all of its personal property situated in the city of Port Angeles, Clallam county, Washington, known and designated as the ‘Port Angeles Waterworks.’

“(4) That thereafter, and on or about the 1st day of June, 1892, the said company, then known as the Port Angeles Water Company, executed to the Seattle Safe Deposit & Trust Company a trust deed or mortgage covering the same property to secure the payment of certain bonds issued by said company in the amount, to wit, the sum of \$40,000.

“(5) That at the time of execution and delivery of both of said mortgages hereinbefore set forth said corporation was not indebted for any taxes against its said property.

“(6) That on or about the 1st day of February, 1896, there was due and collectible upon said mortgaged property on account of taxes for the years 1892, 1893 and 1894 the sum of \$2,969.30.

“(7) That on or about said date the treasurer of Clallam county, Washington, duly levied upon and distrained all of the property of the said defendant water companies, posted notices according to law, and advertised said property for sale to satisfy the amount due for such taxes.

“(8) That on or about the 10th day of February, 1896, for the purpose of preserving said property from such tax sale, protecting the plaintiff's interest by virtue of his said mortgage, plaintiff paid the said taxes to the said treasurer, and received his tax receipts therefor.

“(9) That thereafter the said Angeles Water Company duly turned over and delivered to the defendant A. P. Burwell the possession of the said waterworks plant and all the property of the said defendant corporations. That thereafter the said safe deposit and trust company duly assigned and transferred to said defendant A. P. Burwell the before mentioned trust deed or mortgage.

“(10) That thereafter the said plaintiff and the said defendant A. P. Burwell both instituted such proceedings as were necessary for the purpose of foreclosing their respective interests against said corporation and said property. That the contention of both said plaintiff and said defendant Burwell in the litigation resulting from such proceedings was as to which of said parties had the prior lien by virtue of said mortgage against said property. That upon the trial of said cause in the superior court of said Clallam county it was adjudged and decreed that this plaintiff had such prior lien, and judgment was entered accordingly. That thereafter, upon appeal of said cause to the supreme court of the state of Washington, said judgment was reversed, and it was determined that said defendant Burwell's trust deed was a prior lien to plaintiff's mortgage.

(11) That said defendant Burwell and said defendant water company have had the benefit of the taxes so paid by plaintiff.

(12) That the said defendant corporations are insolvent, and have no property at all out of which to realize the repayment of such taxes, and that plaintiff has no remedy in law to recover the same.

“(13) That said A. P. Burwell had full knowledge of the proceedings of the said county treasurer to sell said property to satisfy the taxes due thereon, and was

Dec. 1902.] Opinion of the Court.—RAVIS, C. J.

requested by this plaintiff to pay said taxes, which request was refused, whereupon plaintiff paid the same."

A general demurrer was interposed to the complaint, and overruled, to which ruling an exception was preserved, and thereafter the defendant Burwell answered, pleading a former adjudication of the same controversy between the same parties, reported in 24 Wash. 104 (63 Pac. 1095). A general demurrer was interposed to the answer, and sustained, when, said defendant declining to plead further, a decree was given in favor of plaintiff.

1. The plea of *res adjudicata* will be first considered. This case, reported in 24 Wash. 104 (63 Pac. 1095), was between the same parties. An examination of the facts of the case in the opinion shows that the plaintiff in the present case there instituted his suit to foreclose a mortgage owned by him upon the same property, the waterworks system, and in his complaint claimed the same taxes now claimed. The complaint there alleged, in substance, the priority of plaintiff's mortgage over the claim of the defendant Burwell, a trustee, who claimed under a subsequent trust deed or mortgage; and the taxes claimed therein were demanded by virtue of the plaintiff's claim that his mortgage was on the system of waterworks as real property. The rights asserted were on a real mortgage. Defendant Burwell was there held to be a subsequent mortgagee for a valuable consideration, in good faith, without notice of plaintiff's mortgage, when the trust deed was executed to him. The waterworks system was held to be personal property, and it was found that plaintiff's mortgage was not recorded in the book required for the registration of chattel mortgages, and the mortgage of defendant Burwell was adjudged superior to plaintiff's mortgage. The judgment there of the su-

terior court was reversed. It will be observed on an examination of this case that one error alone was considered on the appeal. The court observed:

"Although the record in this case is quite voluminous, and many errors are assigned by appellant in his brief, the real points argued and relied on by appellant as grounds for a reversal of the judgment are not numerous. The material errors alleged are: (1) That plaintiff (respondent) failed to prove that he loaned or advanced any money to the first company; (2) that the note and mortgage set out in the complaint are defective and insufficient to give constructive notice to appellant Burwell, or to any one; (3) that said mortgage was not recorded in a volume kept exclusively for the recording of mortgages of personal property, and was not indexed as required by law; and (4) that said note and mortgage were not authorized by said company through its board of trustees, or at all. It is conceded by the respondent that the trustee named in the mortgage or trust deed executed by the Angeles Water Company had no actual notice or knowledge of respondent's mortgage, and it therefore follows that, if the said trustee was not charged with constructive notice thereof, the trust deed, having been given for a valuable consideration, must be deemed a valid and prior lien upon the property described therein. Our statute provides that a mortgage of personal property is void as against creditors of the mortgagors or subsequent purchasers and incumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and is acknowledged and recorded in the same manner as is required by law in conveyance of real property. 1 Hill's Code, § 1648; Bal. Code, § 4558. And it is further provided that such mortgage must be recorded in the office of the county auditor of the county in which the property is situated, in a book kept exclusively for that purpose. 1

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

Hill's Code, § 1649; Bal. Code, § 4559. The respondent's mortgage, it is conceded, was recorded in the records of real estate mortgages only; and if, as appellant contends, it is a mortgage of personal property, the record imparted no notice to appellant, and it will not be necessary to determine any question other than that presented by the third assignment of error."

It was observed of the nature of the claim by plaintiff for the taxes paid:

"It is stipulated by the parties hereto that the property involved in this controversy was assessed for the years 1892, 1893, and 1894, pursuant to law, as personal property; that the taxes assessed thereon became delinquent; that the said property was advertised for sale by the county treasurer; and that the respondent, for the purpose of protecting his claim and lien, paid the full amount of the taxes levied upon the property. It seems that respondent also paid the taxes on the water plant for subsequent years, and the sums so paid were adjudged a lien upon the property assessed by virtue of § 109, p. 322, Laws 1891, which provides that any person who has a lien, by mortgage or otherwise, upon any real property on which the taxes have not been paid, may pay such taxes, and that the same shall constitute an additional lien. As this provision relates to liens upon real property only, the payment of the taxes by respondent created no lien in his favor; and, although it would seem that those who were benefited thereby are morally bound to repay the same to the respondent, no judgment can be rendered therefor in this proceeding."

It plainly appears that the court only determined the priorities between plaintiff and defendant Burwell as to their respective liens upon the property, and it was determined that the mortgage held by plaintiff was upon personal property, and not recorded so as to impart notice to defendant Burwell. The court expressly decreed that the moral obligation to repay these taxes then

existed, but that no decree therefor could be rendered in that action. It thus appears from the opinion and facts stated in the former case that the right to recover the taxes paid by plaintiff was not determined. The cases of *Wilkes v. Hunt*, 4 Wash. 100 (29 Pac. 830), and *Wilkes v. Davies*, 8 Wash. 112 (35 Pac. 611, 23 L. R. A. 103), show where the same parties and controversy were before the court in the former action, and the court did not determine the controversy because the remedy there was not deemed appropriate. It was held in the latter case that there was no adjudication constituting an estoppel. The rule is very well stated in *Marble Savings Bank v. Williams*, 23 Wash. 766 (63 Pac. 511):

“Where a judgment in a former action is pleaded as an estoppel in a subsequent action between the same parties involving the same subject-matter, and the record does not disclose upon which of several issues the case was litigated and decided, extrinsic evidence is admissible for the purpose of establishing that the former action was determined upon an issue which is not involved in the subsequent action.”

The record itself in the case pleaded in estoppel shows the claim for repayment of taxes was not determined on its merits. Plaintiff in that case claimed the repayment under a lien given by the statute for payment of delinquent taxes by a mortgagee of real estate for the protection of his lien. The court held the property was not real estate, and as against defendant Burwell plaintiff had no mortgage lien on the property, and observed of the repayment of the taxes no decree could be made for them in the action. The plea of *res adjudicata* is not well taken.

2. Plaintiff believed he had a valid lien upon the system of waterworks. In good faith he paid the delinquent

Dec. 1902.] Opinion of the Court.—REAVIS, C. J.

taxes to protect this lien. The trustee, defendant Burwell, had full knowledge of the delinquency of the taxes and of the intention of the plaintiff to pay them unless he should pay them. Plaintiff now seeks to be subrogated to the rights of the county, and to enforce the original lien for the taxes against the property. Subrogation peculiarly involves equitable principles. It does not depend upon contract, but is founded on principles of natural justice. It has been frequently applied to the payment of taxes made in good faith by one who deemed it necessary to protect a lien on the property where taxes were levied, although no lien existed in law. See *Knighton v. Curry*, 62 Ala. 404. In *Fischer v. Woodruff*, 25 Wash. 67 (64 Pac. 923, 87 Am. St. Rep. 742), it was held, where a subsequent mortgagee paid taxes on the mortgaged property in good faith to protect his lien, he was entitled, on his mortgage being defeated by prior incumbrances, to have the taxes so paid declared a first lien on the property. The case of *Packwood v. Briggs*, 25 Wash. 530 (65 Pac. 846), was where the holder of a general judgment lien paid delinquent taxes upon real property. The lien of the judgment was pronounced invalid as against a mortgagee. The taxes, however, were made a lien on the mortgaged premises. It was observed: "It follows that, if appellant is entitled to relief on account of the taxes paid, it must be based upon equitable grounds, considered with reference to the relations of the parties to the subject-matter. It must be conceded that appellant paid the taxes in good faith, relying upon what he believed to be his lien as authority for it. It cannot be assumed that the payment was made as that of a mere volunteer, or as that of one meddling with something in which he knew he had no interest. The evidence shows

that the payment was made in the honest belief that appellant held a valid lien upon the land, and he was only seeking to prevent the paramount lien of the taxes from destroying the value of what he believed to be his own lien against the lands." It may be observed here that the repayment of the taxes was adjudged in that case upon general equitable considerations. In the present case the decree before us impressed the tax together with all penalties of delinquency under the revenue act as a lien upon the property. We think in equity the plaintiff is entitled to the principal sum paid on the settlement of the taxes, together with the legal rate of interest thereon from that date until paid. He ought not to collect the penalties provided by the statute. The measure of his recovery is the amount of money he paid and legal interest from the date of payment.

With this modification, the judgment of the superior court is affirmed. Costs to appellant.

ANDERS, MOUNT, DUNBAR and FULLETON, JJ., concur.

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[No. 4464. Decided December 31, 1902.]

THE STATE OF WASHINGTON *on the Relation of F. P. Race et al., Respondents, v. THOMAS CRANNEY, as Treasurer of Island County, Appellant.*

APPEAL — INTEREST OF APPELLANT.

Where one has sufficient interest to be made a party to an action, he cannot be denied an appealable interest in the cause, should the judgment be against him.

MANDAMUS — ISSUANCE OF TAX DEED — PARTIES TO PROCEEDING.

Upon a petition for mandamus to compel a public officer to

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

convey lands purchased at tax sale, private persons who claim an interest in the land are proper party defendants, under the provisions of our code which permit the rights of all persons in the subject-matter in controversy to be determined in one action.

SAME—RIGHT OF REDEMPTION.

A county treasurer is warranted in refusing to execute a conveyance to the purchaser at a delinquent tax sale, although the latter has tendered all the taxes due and is fully entitled to a deed, if before conveyance full redemption is made by the owner, since the statute governing tax sales permits redemption therefrom at any time before the execution of the tax deed.

Appeal from Superior Court, Island County.—Hon. GEORGE C. HATCH, Judge. Reversed.

Lester Still and S. D. King, for appellant.

A. W. Buddress, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—The respondents move to dismiss the appeal herein for the reason that the appellant has no appealable interest in said cause. There seems to be nothing in this motion. If a party has sufficient interest to make him a party to an action, he has sufficient interest to appeal should the judgment be against him. The motion is denied.

This is a proceeding in mandamus. The alternative writ was not asked for, but a petition or complaint was filed alleging, in substance, that the petitioners had bought at tax sale the lands described in the petition; that the money to pay for the same had been delivered to the treasurer of Island county, who neglected and refused to execute a deed as by law provided; that the defendants Graham and Keene claim some interest in and to the land, which the petition alleged to be inferior and subordinate to the claim of petitioners. The

petition prayed for a peremptory writ of mandate against defendant Cranney, as treasurer of said county of Island, commanding him to forthwith make, execute, and deliver to said relators, as provided by law, a good and sufficient deed of conveyance of and to the premises described; that relators have judgment against said Cranney, as treasurer, for the sum of \$1,500 damages; that they have judgment against all of said defendants forever debarring and foreclosing them from claiming or asserting any right to said premises, and for their costs and disbursements. Notice of application for mandate was duly served. The defendants moved to dismiss the petition for the reason that several distinct, separate, and independent matters and several parties defendant were improperly united; that the claim and title of defendants Graham and Keene, or either of them, cannot be inquired into on proceedings in mandamus; and that defendant Cranney had no interest or concern therein. This motion was denied, and a demurrer was interposed by defendant Cranney, to the effect that the petition did not state facts sufficient to constitute a cause of action, and for the other grounds mentioned in the motion to dismiss. The demurrer was overruled, and the defendant Cranney answered. The essential part of the answer is that the defendant Rebecca Graham was the owner of the lands and premises in the petition mentioned; that on the 7th day of March, 1902, the relators delivered to the treasurer the private and personal check of John Seymour, drawn upon and payable by a bank situate and doing business in the city of Everett, Snohomish county, Washington, for the sum of \$123.40, and then demanded a deed of conveyance to relators of said lands as upon said tax sale; that afterwards, on the 7th day of March,

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

1902, and before any deed whatever had been either drawn, signed or executed, the said defendant, Rebecca Graham, as owner of said lands, paid to the defendant Cranney, as county treasurer, the sum of \$120.40, in full payment of all taxes, interest, costs, and penalties upon all said lands and premises, and for which the same was so sold, and in full redemption of said lands, and the whole thereof, from said sale thereof mentioned in said petition; whereupon said defendant, as treasurer, made, signed, and sealed a due and lawful certificate of redemption of said lands, and the whole thereof, from said sale, to said Rebecca Graham; and for said reason refused to make and deliver to relators the tax deed demanded. The treasurer, in his affirmative answer, states that upon receiving a check from the relators for the payment of the taxes he transmitted the same to Dexter Horton & Co., Bankers, of Seattle, for collection, and credit to his account; but before he was notified by the bank that the check was paid and the amount credited to him the money had been received for the redemption of said land. Upon this state of pleadings the case went to trial, and the court found the state of facts upon which it based its conclusion that the relators were entitled to the deed demanded, and the mandate was issued to the defendant Cranney, treasurer aforesaid, commanding him forthwith to make, execute, and deliver said deed to the relators aforesaid to the land described in the petition. It was further decreed that neither of said defendants Rebecca Graham or A. I. Keene had any right, title, or interest in or to the said premises; that the said relators Race and Seymore were the owners in fee simple, and entitled to the possession of the premises described in the petition, and were entitled to costs and disbursements

against all the defendants. No damages were awarded. From this judgment the appeal is taken.

We will first notice the petition and demurrer, which may be considered together, as they involve the same question, viz., that the court erred in investigating the validity or invalidity of the asserted claims of defendants Graham and Keene in a mandamus proceeding, and that the complaint was bad for the reason that defendants Graham and Keene were joined with the treasurer in the petition. It is insisted that the office of the writ is limited to the control of official action, and the inclusion of foreign matter bears the whole to the ground. This might be true if any foreign matter had been included in the petition; at least the petition in such case would have been subject to a motion of some kind. But as we view the petition in this case, the incorporation of the defendants Graham and Keene was not the incorporation of foreign matter, but was an attempt to have interests adjudicated which were vitally connected with the subject matter of the proceeding. Mandamus originally issued only out of the court of King's Bench. It was a prerogative writ, and its scope was exceedingly limited. There is no such thing as a prerogative writ in our judicial system, nor can there be under our form of government; but mandamus is a procedure under our Code. It is a judicial investigation, the object of which is the determination of civil rights, the same as in any ordinary proceeding; not only the determination of rights, but their determination in such a way as to culminate in an effective judgment. Therefore all rights of all parties, which are necessary to the conclusiveness of the judgment, should be determined in the proceeding; otherwise a multiplicity of suits would become necessary, the prevention of which is the evident and ex-

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

press object of the statute. As distinguished from the old common-law writ, and the restrictions which were thrown around not only its execution, but the courts from which it could issue, our statute (§ 5755, Bal. Code) provides that:

"It may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person."

In this case the writ is invoked to compel the performance of an act which the law specifically enjoins as a duty resulting from an office. The law provides, in § 5760, Bal. Code, for the trial in certain cases by a jury, and also provides that damages may be awarded in such cases. Section 5775 provides that, "Except as otherwise provided in this chapter, the provisions of the Code of Procedure concerning civil actions are applicable to and constitute the rules of practice in the proceedings in this chapter." Under the general provisions of the Code of Procedure concerning civil actions there is no question but that all the parties who were brought into court by this petition would have been proper parties to a complaint. Indeed, they would have been necessary parties to have insured an effective determination of the questions raised; for the rights of the defendants Graham and Keene could not have been adjudicated in an action against the treasurer, to which they were not made parties. Under this sweeping provision of the statute we see no escape from the conclusion that all parties whose interests were affected by the judgment were

proper parties to the action, and were properly brought in. This is in harmony with the spirit of the Code generally.

A great many cases are cited by the appellant on this proposition, but we are unable to conclude from an investigation of them that any of them sustain the contention advanced. This question was passed upon, however, by the supreme court of California in *People v. Board of Supervisors*, 27 Cal. 655, and there it was held that the provisions of the Code of Procedure concerning civil actions were applicable to proceedings in mandamus applied to the pleadings in a mandamus case and to the proceedings generally. It may be noticed in passing that § 5775, *supra*, which was an amendment to the Laws of 1895, is a literal translation of the California statute, and the presumption is that the construction which the courts of California placed upon the statute prior to the incorporation of that statute into our laws was taken into consideration by the legislature in adopting the California law. The case of *People v. Board of Supervisors*, just mentioned, was decided in April, 1865. The court in that case said:

"The final determination of the court in the matter is a judgment, and if rendered in any court but the supreme court an appeal lies from the judgment. The parties appear, and by their pleadings form issues, and if of fact they may be tried by a jury, and new trials may be had. The relator may in the same action recover the damages he may have sustained, and execution may issue for the damages and costs. In *People v. Croton Aqueduct Board* (5 Abb. Pr. 372), it is held that the rules of the code of New York do not apply to mandamus, because Sec. 471 (Code of New York) expressly excludes from their operation that class of cases. There is no such reservation in our Practice Act, and in our opinion the

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

general rules of that act are applicable to mandamus, in the same manner as to an action for an injunction or of *quo warranto*; and whatever may be the rule when the relator, after having procured the alternative writ, moves for the peremptory writ, we have no doubt that, when the relator proceeds by petition and notice for the peremptory writ, without procuring an alternative writ, the court, under the enlarged discretion conferred by Sec. 147, may grant any relief consistent with the case made by the petition, and embraced within the issues, although it may be only a part of that demanded in the prayer of the petition."

The same remark may be made in this case concerning the excluding statute of New York, viz., that there is no reservation in our practice act.

"Where the title to real property may be affected by proceedings for a mandamus, all persons having or claiming rights therein must be joined as respondents." 13 Enc. Pl. & Pr., p. 660.

It is also asserted in the same section that private persons specially affected by the act of an officer, to coerce whom mandamus proceedings were instituted, should be joined as defendants. It would seem that the defendants Graham and Keene in this case are private persons whose interests would be affected by the coercive action on the treasurer. In *Wright v. Commissioners of Gallatin County*, 6 Mont. 29 (9 Pac. 543), it was held, in a case where commissioners were sued to compel the awarding of a contract for printing, where bids had been submitted, that the validity of such contract could not be determined without joining the person to whom the contract had been awarded. Here the land had, so far as the action of the treasurer could award, been awarded to the defendants Graham and Keene. It was said in *State ex rel. Marsh v. Board of Land Commissioners*, 7 Wyo.

Opinion of the Court.—DUNBAR, J.

[30 Wash.

478 (53 Pac. 292), where it was sought to mandamus the board of land commissioners to execute a lease, and thereby confer upon relator the lessee's title while another lease covering the same land was in force, held by another party:

"It is elementary in our jurisprudence, that any person whose interests are directly involved in a legal proceeding shall have an opportunity to be heard, before a judgment can be rendered determining and concluding his rights."

"Nor will mandamus to compel the commissioner of the general land office to give title to public land be granted where it appears that there are other claimants who are not parties to the proceeding, notwithstanding that their claims are alleged in the petition to be void." Spelling, Injunctions and Other Extraordinary Remedies (2d ed.), § 1639.

In *Cullem v. Latimer*, 4 Tex. 329, where there was a claim to lands by different persons, the court said:

"The defendant, in his original answer, states that John H. Duke, John H. Glover, and others are interested in the matters contained in the plaintiff's petition, and prays that they may be cited to defend, as he has no other interest than as county surveyor. It is a rule in applications for mandamus that all persons principally interested in the defense must be included in the rule to show cause. . . . The writ issues to compel the performance of a duty, but the survey or patent being predicated on the supposition that the land is vacant, or if not vacant, that the claimant has the best right, all persons who, to the knowledge of the applicant, claim property in the land should be summoned to defend their rights."

We think, under the provisions of the Code and of authority generally, that the petition was not subject to the attacks made upon it either by demurrer or motion,

Dec. 1902.] Opinion of the Court.—DUNBAR, J.

and that no error was committed in overruling both the motion and demurrer.

On the merits of the case, however, we are inclined to differ with the learned judge who tried the cause. We agree with the respondents that the tender which was made by the relators was sufficient, and that, if the treasurer accepted the check of either of the parties as payment of the taxes, he would be precluded from now raising the question of non-tender. But the treasurer refused to execute the deed for the reason that, before the deed was executed, the land had been redeemed by the owner, Mrs. Graham. The statute seems to make provision for the redemption of the land at any time before the execution of the deed. It is stoutly contended by the respondents that there was no proof of ownership by Mrs. Graham, but we think the proof as presented to the treasurer was sufficient to justify him in issuing the certificate of redemption. The money was sent in her name by some one purporting to be an agent for her. The object expressed was the redemption of the land. These matters are not generally performed in any very formal way. In fact, the ordinary way of paying delinquent taxes is by sending the pay either directly by check, or, not uncommonly, through an agent; and the treasurer is not presumed to scan closely the relations existing between the owner and the assumed agent who is redeeming the land in the owner's name. It is true that neither the agent nor the owner testified in this cause, but the land was assessed in the name of "R. Graham," the foreclosure suit was against "R. Graham," and, while it does not appear conclusively that "R. Graham" was Rebecca Graham, it does appear that this same land had, in 1894, been distributed to Rebecca Graham, who was then the owner

of it, that the taxes began to accumulate in 1895, and that the agent redeemed the land for Mrs. Graham, the defendant. Moreover, it is testified by King, one of the attorneys in the case, that he knew Mrs. Graham, having acted for her as counsel in some other proceedings, and that she said she would tell Mr. Behrens, the agent who did send the money for the purpose of redeeming the property for her, to send the money to redeem this property. This, it is true, is hearsay testimony; but it was received without objection, and we know of no rule of law which would prevent this court from considering it. There are no equities in favor of the purchaser of the tax title in this case, the equities being with the redemptioner or the owners.

Under all the circumstances of the case, meager as the testimony is, we think the treasurer was justified in issuing the certificate of redemption and in refusing to execute the deed. The judgment will therefore be reversed, with instructions to the lower court to dismiss the petition.

REAVIS, C. J., and FULLERTON, ANDERS and MOUNT, JJ., concur.

[No. 4868. Decided January 2, 1908.]

CAROLINE R. MAGGS, *Respondent*, v. LEWIS J. MORGAN,
Appellant.

TRESPASS — RESTRAINING ORDER — VACATION.

The denial of a motion to vacate a restraining order cannot be urged as error, where the parties to the action had voluntarily entered into a stipulation that the order should be continued until the final determination of the cause.

SAME — RIGHT TO JURY TRIAL.

An action to restrain the continuance of a trespass, to recover damages therefor, and to remove a cloud from title to real estate,

Jan. 1903.] Opinion of the Court.—MOUNT, J.

being one of equitable cognizance, a jury trial is not demandable as a matter of right.

SAME — ACTUAL POSSESSION — PLEADING.

Residence upon land is unnecessary in order to establish actual possession; and actual possession is sufficiently set forth where the complaint alleges that "plaintiff is now and for more than fifteen years next prior to the date of this complaint has been, the owner in fee simple absolute and in the actual, notorious and open possession" of the lands in controversy.

SAME — DESCRIPTION OF LANDS.

In an action to restrain trespass and quiet title to certain lands, the description of the lands in the complaint is sufficiently definite when it shows where the land is located and is sufficient to enable the boundaries to be readily traced on the ground.

CONTINUANCE — INSUFFICIENCY OF SHOWING.

A motion for continuance was properly denied, when there was not a sufficient showing of diligence, nor that the desired evidence was not cumulative.

Appeal from Superior Court, Kitsap County.—Hon. JOHN C. DENNEY, Judge. Affirmed.

Carroll & Carroll, for appellant.

Preston & Embree, for respondent.

The opinion of the court was delivered by

MOUNT, J.—Action to restrain the continuance of an alleged trespass, to remove a cloud from the title to certain real estate, and for damages. Upon the filing of the complaint the court below issued a temporary injunction. When the defendant was served and appeared in the action, a stipulation was entered into continuing the restraining order in force until the final determination of the cause. An answer was subsequently filed, alleging a settlement of the matters in dispute, and praying for a dismissal of the cause. After this answer was filed, the appellant made a change of attorneys. Thereupon the first

answer was ignored, and an answer to the merits was filed, and a motion made to dissolve the restraining order. But no attempt was made to avoid the stipulation. This motion was denied, and subsequently the cause was set down for trial on December 4, 1901. Before the day set for the trial, and on November 19, 1901, a motion was served by the defendant upon the plaintiff for a continuance of the trial, and for leave to file an amended answer. This motion was granted on November 25, 1901, and defendant given leave to file an amended answer. The trial of the cause was continued until December 5, 1901. On the day the cause was to be tried, the appellant filed a motion, supported by affidavit, for a further continuance, which was denied, and the cause proceeded to trial by the court without a jury.

The questions presented on this appeal are, substantially: (1) That the court erred in denying the motion to set aside the restraining order; (2) in denying appellant's motion for a continuance; (3) in refusing appellant's request for a jury trial; and (4) that the complaint does not state facts sufficient to constitute a cause of action. The court below was justified in denying the motion to vacate the restraining order upon the ground alone that the parties had voluntarily entered into a stipulation that the order should be continued until the final determination of the cause. There was no sufficient showing of diligence to grant a continuance of the trial, nor was there any showing that the evidence which appellant set forth in his affidavit for a continuance was not cumulative. For these reasons, the court properly denied the motion. The cause is one of equitable jurisdiction, and this court has frequently held that a jury trial is not a matter of right in such cases. *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67 (31 Pac. 327); *Winternute v. Carner*, 8 Wash. 585, 590 (36 Pac.

Jan. 1903.] Opinion of the Court.—MOUNT, J.

490); *Murray v. Okanogan Live Stock, etc., Co.*, 12 Wash. 259 (40 Pac. 942). It was therefore not error to refuse a jury trial.

It is claimed that the complaint is insufficient because it is not alleged that the plaintiff is in the actual possession of the land in controversy. If this allegation was necessary, we think it is sufficiently alleged in the complaint where it is stated "that the plaintiff is now, and for more than fifteen years next prior to the date of this complaint has been, the owner in fee simple absolute, and in the actual, notorious, and open possession, of the following lands" (describing them). It is true the plaintiff testified that she resided in Seattle, King county, and that the lands in dispute are in Kitsap county; but she also testified that she had for many years been in possession of the lands, had them fenced, pastured them with stock in the non-productive season, cut hay therefrom in the harvest season, and paid the taxes thereon continuously. It is not necessary that she should actually live upon or be upon the lands, in order to maintain actual possession.

It is also urged that the description of the lands is not sufficiently definite, and for that reason the complaint does not state a cause of action. The description is long and complicated, and, in order to be fully understood, would require a diagram, which it is impracticable to set out in this opinion. The point is not of sufficient importance to require the description to be set out here. It is enough to say that the description is sufficient to show where the land is located, and to enable the boundaries to be readily traced upon the ground.

The judgment is therefore affirmed.

REAVIS, C. J., and DUNBAR, ANDERS and FULLERTON, JJ., concur.

[No. 4819. Decided January 5, 1908.]

R. S. GLADWIN, *Respondent*, v. A. L. AMES, *as City Treasurer, et al., Appellants.*

MUNICIPAL CORPORATIONS — LIMIT OF INDEBTEDNESS — NECESSARY EXPENSES.

Warrants issued by a city in excess of its constitutional limit of indebtedness are valid on the score of necessity for the perpetuation of its corporate existence, when such warrants were issued to cover the expenses of constructing a jail, boarding prisoners, feeding impounded stock, guarding quarantine patients, publishing notice of election, printing ballots, insurance on city buildings, services in making assessment rolls, city printing, postage and stationery for city officers, and necessary expenses of the city clerk.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Affirmed.

Robertson, Miller & Rosenhaupt, for appellants.

Danson & Huneke, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The statement of this case is found in 26 Wash. 272 (66 Pac. 391). The question at issue was the legality of certain warrants issued by the town of Cheney; the record showing that at the time of the issue of the warrants the municipality exceeded the limit of its indebtedness under the constitutional limitation of one and one-half per centum, and that no election had been held to validate any of the indebtedness. It was decided in that case that the rule announced by this court in *Rauch v. Chapman*, 16 Wash. 568 (48 Pac. 253, 36 L. R. A. 407, 58 Am. St. Rep. 52), in relation to the validity of warrants for necessary expenses in a county, applied to municipal corporations such as the town of Cheney. It was also decided

Jan. 1903.] Opinion of the Court.—DUNBAR, J.

that warrants for the services of policemen, marshals, and treasurers come within the requirement of necessities. But it was found that the findings of fact of the court were not specific as to the purposes for which all the warrants in controversy were issued, and the case was remanded, with instructions to the superior court to find the nature of all obligations for which the warrants in suit were issued, and directed that those issued for necessary expenses in maintaining the existence of the municipality be adjudged valid. In obedience to this mandate, the court has made findings and adjudged the validity of certain warrants, from which judgment this appeal is prosecuted.

The warrants described in subdivisions "b," "e," "f," "g," "j" and "k" of the findings to which exceptions were taken by appellants, were issued for labor and material furnished in the building of a city jail. It seems too plain for argument that, considering the well-authenticated and well-known history of crime, it is absolutely necessary for the protection, and therefore for the existence of the city, that some provision should be made for the compulsory detention of criminals. Subdivision "m" refers to the warrant issued for guarding quarantine patients. Surely the protection of the health of the citizen from contagion is an imperative duty of the city, and in the performance of this duty it must necessarily incur expenses. The warrant falling under subdivision "n" was for publishing notice and printing ballots. A city organization, under our form of government and under the charter provisions of this city, cannot be maintained without elections, and the law governing elections and insuring their efficacy cannot be enforced without expense. The impounding stock may very well be recognized as a necessity in all well regulated cities of the present day. It is not only conducive to cleanliness and the preservation of property, but to the

actual safety of the inhabitants. The feeding of impounded stock necessarily follows their impounding, and a warrant for such services was the payment of a necessary expense. What we have said above applies to warrants issued in payment for boarding city prisoners. It is the duty of the city to imprison its criminals. It follows that it must furnish subsistence for them during the period of their detention. Insurance on city buildings is a well recognized method of protection. Warrants representing services in making assessment rolls, the furnishing of officers with postage stamps and stationery, warrants for city printing and for the necessary expenses of the city clerk, are all for necessary expenses in the management of the city. The business of the city has to be transacted, and it is necessary, to insure an orderly transaction of such business, that much material in the way of furnishings be obtained, and much time and labor expended in transacting such business. It is not believed that philanthropy or patriotism can be depended upon to supply, without cost, for any great length of time, either the services or the material necessary to the transaction of the business of the city; and the payment of such expenses is therefore necessary for the perpetuation of its corporate existence. The warrants in question all seem to be valid, under the rule announced in *Rauch v. Chapman, supra*.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON, MOUNT and ANDERS, JJ., concur.

Jan. 1903.Syllabus.

[No. 4378. Decided January 5, 1903.]

THE STATE OF WASHINGTON, Respondent, v. W. J. YOUREX, Appellant.

HOMICIDE — ADMISSIBILITY OF EVIDENCE — CERTIFIED CONSTABLE'S BOND.

A copy of the bond of a constable, certified by the county clerk, is admissible in evidence to establish the official character of an individual as constable, since the county clerk is the proper custodian of the bonds of constables, under Laws 1889-90, p. 34, which makes such officer the custodian of the official bonds of all county and township officers.

SAME — WARRANT OF ARREST — VALIDITY.

Under Bal. Code, §§ 6678, 6683, 6695, which require only the substance of the complaint to be recited in a warrant of arrest for misdemeanor, a warrant is not void on its face when it authorizes the officer to arrest defendant for defacing a building, described as the property of B. "and divers other persons," further reciting that it was not the property of defendant.

SAME.

The fact that a warrant for the arrest of defendant for defacing a building belonging to private parties recited that the building was upon the public highway would not render the warrant void on its face, inasmuch as there are circumstances when such a building may lawfully be upon the public highway.

SAME — OBJECTIONS TO EVIDENCE — WAIVER.

Where a warrant of arrest had been admitted in evidence without objection, except to the purported return indorsed on the back thereof, which was ruled out, it was not error to permit the warrant itself to be taken to the jury room, although containing the return on its back which was not in evidence, since the defendant waived all objections by permitting the introduction of the warrant in evidence without asking for the obliteration or concealment of the indorsement.

SAME — VALIDITY OF WARRANT — QUESTION OF LAW.

The question of whether a warrant of arrest was either valid or void upon its face being one of law, it was not error for the court to charge the jury that the warrant authorized an officer to make the arrest, where the court had already determined in favor of its validity.

SAME—INSTRUCTIONS—INFERENCES FROM FACTS.

In a prosecution for murder, the refusal of requested instruction that no unfavorable inference should be drawn against the defendant from the fact that he carried a loaded revolver upon his person at the time of and immediately prior to the commission of the act for which he was being tried, was not error, since the inferences deducible from the facts in evidence were questions wholly for the jury.

SAME—INFORMING JURY OF PENALTY AFTER THEIR RETIREMENT.

The fact that, after a jury in a prosecution for murder had retired to the jury room, they were brought back into court at their own request, and informed as to the statutory penalty for the crime of manslaughter, would not constitute error.

Appeal from Superior Court, Chehalis County.—Hon. MASON IRWIN, Judge. Affirmed.

W. H. Abel and A. M. Abel, for appellant.

J. A. Hutcheson, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

FULLETON, J.—The appellant was informed against for the crime of murder in the first degree, tried upon the charge, and found guilty by the jury of the crime of manslaughter. From the judgment of conviction pronounced upon the verdict, he appeals. The facts necessary to an understanding of the errors assigned, briefly stated, are these: On November 13, 1901, a complaint was filed before one of the justices of the peace for Cosmopolis precinct, Chehalis county, charging the appellant with having committed the statutory misdemeanor of defacing a building not his own. On the filing of this complaint the justice issued a warrant commanding the sheriff or any constable of the county to forthwith apprehend the appellant, and bring him before the justice to be dealt with according to law. In the body of the warrant the offense of which the appellant was accused was recited in the following lan-

Jan. 1903.] Opinion of the Court.—FULLERTON, J.

guage: "that on the 6th day of November, 1901, at Canto, in said county, that one W. J. Yourex, then and there being, did then and there wilfully and unlawfully deface and tear down and destroy one certain building standing and being on the county road in section number 7, township 15 N., range 9 West, Willamette Meridian, known as the 'Warehouse,' and which said building was then and there owned by said W. H. Bowen and divers other persons, and was not the property of the said W. J. Yourex nor owned by him." This warrant was placed in the hands of one C. Y. Fenwick, a constable for Cosmopolis precinct, for service, who immediately proceeded to the residence of the appellant, which was at some considerable distance from Cosmopolis, reaching there early in the morning of the 15th of November. While on his way, the constable passed the houses of two of the neighbors of the appellant, informed them of his business, and took them with him to the appellant's house. As to what occurred after the parties reached the house, there is a dispute in the evidence. The officer and the neighbors accompanying him testify that the warrant was read to the appellant, and that he was duly placed under arrest. They say further that the appellant objected to going to Cosmopolis on that day, giving as his reason that he had a contract for carrying the United States mail; that the next day was one of the days when he was required to make a trip, and he feared he could not return in time to perform that duty; and that the officer answered him by saying that his case could hardly be tried that day, and he could doubtless make arrangements to return. The appellant denies that he was placed under arrest then, or at any time, for the charge contained in the warrant, but testifies that he was told by the officer that he was being summoned in a civil action, and that he could go to Cosmopolis on that day, and return in time to

carry the mail on the next, and that he went along with the officer with that understanding. The officer and the appellant reached Cosmopolis between two and three o'clock in the afternoon. They went at once to the justice's office, when the appellant immediately became engaged in a conversation with the justice concerning his case. On the road to Cosmopolis the officer had discovered that the appellant was armed, and, while the justice and the appellant were talking, he left them, and went after one Silas W. Smith, who was then acting as marshal of the town of Cosmopolis. When the officer returned to the justice's office with Smith, they approached the appellant, and the constable asked him if he was armed, at the same time saying that it was his duty as an officer to take his arms away from him, if he had any. On the constable's making this statement, the appellant immediately arose to his feet from the chair in which he was sitting, drew his revolver, and declared he would not give it up; that the officer had no right to take it; that he was a United States mail carrier, and no one but a United States marshal could take his arms from him. Both the constable and Smith drew their revolvers when the appellant arose. After he had made his statement, they expostulated with him, telling him he was under arrest, and that it was his duty to give up his revolver. The appellant, however, persisted in his refusal, saying finally that he was going home, and at the same time he backed to the office door, and from thence to the middle of the street, keeping his revolver pointed in the direction of the officers, who were following him. On reaching the middle of the street, the appellant attempted to discharge his revolver at one of the officers, but it missed fire, and the next instant all three of the revolvers were discharged. The shooting continued until all of the revolvers were emptied, resulting in the death of Smith, and

Jan. 1903.] Opinion of the Court.—FULLETON, J.

the serious wounding of the others. It was for killing Smith that the appellant was tried and convicted.

Among the proofs offered to show the official character of Fenwick was a certified copy of his official bond as constable. The certificate thereto was made by the county clerk, and it is objected that the copy was inadmissible as evidence, because the clerk is not, under the statute, the lawful custodian of the official bonds of constables elected or appointed in their respective counties. Formerly the law made the county auditor the legal custodian of bonds filed by constables on their qualification, but by the act of February 13, 1890, it is provided that the official bonds of all county and township officers shall be filed and recorded in the office of the county clerk of their respective counties. Laws 1889-90, pp. 34, 35. The terms "county and township officers" includes constables, and makes the county clerk the legal custodian of their official bonds. No error was committed by the court, therefore, in permitting the certified copy of the bond to be introduced in evidence.

The appellant objected to the introduction in evidence of the warrant of arrest issued on the complaint charging him with a misdemeanor, giving as a reason therefor that the warrant is void upon its face, and insufficient to authorize an officer holding it to make an arrest. It is said, first, that the warrant is insufficient in its recitals, in that it does not give the names of the owners of the building, but we think the warrant was sufficiently specific in that regard. Under the statute (Bal. Code, §§ 6678, 6683, 6695) the warrant need recite only the substance of the complaint, and here the warrant gave the names of the owners as W. H. Bowen and divers other persons, further reciting that it was not the property of the appellant. Where substance, only, in the recitals, is required, this is sufficient as to the ownership. It is next said that the

building defaced is on the public highway, and that it must have been, for that reason, a public nuisance, which any person could abate without committing a misdemeanor. But this argument assumes that a building belonging to a private person can not, under any circumstances, lawfully be on a public highway. Such, however, is not the rule. There are many instances which will readily occur to anyone where the building of a private person may lawfully be on a public highway; and when it is there lawfully it is, of course, as much a crime to deface it as it would be to deface it under any other circumstances, or in any other place. As a misdemeanor could have been committed under the conditions recited in the warrant, the warrant was not void upon its face, and would justify an officer in executing it. It was competent evidence, therefore, to show the officer's authority for making the arrest brought in question on the trial, and no error was committed by admitting it in evidence.

On the back of the warrant was a purported return of the officer who had it in hand for execution. How it got there, or by whom or under what circumstances it was made, the record offers no explanation. When the warrant was offered in evidence, objection was made to this return going to the jury, which objection the trial court sustained; saying that it was not the return of the officer at all, and could not be so considered by the jury. The warrant was then put in evidence without any request that the objectionable part be obliterated or otherwise concealed from the eyes of the jury, or any objection to its going to the jury in the form it then was. At the close of the trial the appellant objected to the warrant being sent to the jury room with the other exhibits in the case, because it had indorsed thereon the objectionable return. The trial court overruled the objection, and error is assigned thereon.

Jan. 1903.] Opinion of the Court.—FULLERTON, J.

Had the appellant requested that the return be concealed from the jury at the time the warrant was introduced in evidence, it perhaps would have been error on the part of the trial judge to have refused to do so. But, having failed to make such a request, or object to the introduction in evidence of the warrant until the objectionable part was concealed, he waived all objections to its introduction on that ground, and cannot afterwards raise the question by objecting to the exhibits being treated as part of the evidence of the cause. The cases of *State v. Moody*, 18 Wash. 165 (51 Pac. 356), and *State v. McCormick*, 20 Wash. 94 (54 Pac. 764), are not in point on the question presented here. In the first of these cases it was held to be reversible error to permit, over the objection of the defendant, a dying declaration to go to the jury room as an exhibit, on the principle that it was in the nature of a deposition, and, as the statute did not permit depositions to go to the jury room, it likewise excluded dying declarations. Presumably—although the court does not so state—the declaration in this case was reduced to writing, and that it was the writing containing the declaration of which the court was speaking. Clearly, such a writing would not be an exhibit. It was simply the testimony of the deceased witness reduced to writing, which, like the testimony of a witness given orally, or read from a deposition, must be left to rest in the memory of the jurors after it has once been given to them. The second case was one where papers entirely foreign to the case on trial were suffered to be taken to the jury room over the objection of the defendant. But here the warrant was an exhibit entitled to go to the jury room. It could only be kept out on the ground that it was inadmissible as evidence; and this question, as we say, was waived by failing to make the objection at the proper time.

The court charged the jury that the warrant issued on the complaint was valid and legal, and authorized an officer to whom it was directed to arrest the person therein named. This is assigned as error. The only question urged against the validity of the warrant was that it was void upon its face. This was a question of law, purely, which did not involve a question of fact, or mixed question of law and fact, and consequently was a question for the court. It was not error, therefore, for the court to charge the jury as to its validity or invalidity. That the law on the question was correctly stated, we have shown by what has been said as to its admissibility in evidence. The contention is also made that the court assumed, in certain of his instructions, that Fenwick was a constable, and had authority to execute writs of court. Aside from the fact that we find no contest in the evidence on this question, the charge as a whole does not bear out the claim. The court instructed the jury on both theories, and left the question for them to determine. As to the requested instructions which were refused, the court properly refused to instruct the jury that no unfavorable inference should be drawn against the defendant from the fact that he carried a loaded revolver upon his person at the time of and immediately prior to the commission of the act for which he was being tried. The fact that he was so armed necessarily appeared in the evidence. The appellant felt called upon, and the court permitted him, to give his reason for carrying a revolver on that day. What inferences were to be drawn therefrom was a question wholly for the jury, and it would have been improper for the court to have instructed them either way in regard thereto. The other requested instructions, in so far as they were proper at all, were covered by the instructions given.

Jan. 1903.] Opinion of the Court.—FULLESTON, J.

After the case had been submitted to the jury, and after they had been out for some time considering it, they were brought into court at their own request, and inquired, through their foreman, if it was proper for the court to inform them what the statutory penalty was for the crime of manslaughter. The court, over the objection of the appellant, gave them the requested information, and his action in that regard is assigned as error. Under ordinary circumstances, either as a part of his general charge, or incidentally in the progress of the trial, we are satisfied that it is not error for the court to inform the jury what the statutory penalty is for the offense of which the defendant stands accused. To hold it error is to hold that knowledge of the penalty for the offense of which a defendant stands accused on the part of a person called to sit as a juror on the trial of such defendant is a disqualification to sit as a juror on that case, and a ground of challenge for cause. Such is not the rule. These penalties are fixed by legislative enactments, are a part of the public statutes of the state, which every citizen, whether liable to jury service or not, has the right to examine and inform himself upon. Nor is such knowledge made a disqualification for jury service by statute. Certainly, it is too much to say that information which one may acquire from the public statutes, and which is not made a disqualification by positive law, becomes a disqualification when obtained on a trial in a court of justice. It may be, and it seems to be generally held, that it is discretionary with the trial court whether it will give this information to the jury or not (See the cases collected in 11 Enc. Pl. & Pr., p. 208); but it must be an extreme case which would require a reversal because such information was given. We do not find that the one before us is such a case.

Opinion of the Court.—DUNBAR, J. [30 Wash.

The other errors assigned, while carefully examined, we have not found it necessary to discuss specially. On the whole, the appellant had a fair and impartial trial, and the verdict of the jury was certainly as favorable to him as the facts warranted.

The judgment is affirmed.

REAVIS, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4416. Decided January 5, 1902.]

JOHN I. CRESSWELL *et ux.*, *Appellants*, v. SPOKANE COUNTY, *Respondent*.

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LIMITATIONS — COMMENCEMENT OF ACTION.

The service of summons and copy of the complaint before the bar of the statute of limitations intervenes, and the filing of the complaint subsequent to the initiation of the bar, is not the commencement of action sufficient to stop the running of the statute of limitations, within the meaning of Bal. Code, § 4807, which provides that, so far as the statute of limitations is concerned, an action shall be deemed commenced when the complaint is filed.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Shine & Winfree, for appellants.

Horace Kimball and Miles Poindexter, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This case presents the question of whether the service of summons, together with a copy of the complaint, is a sufficient commencement of an action to stop the running of the statute of limitations. It was raised by respondent's demurrer to the appellant's amended complaint. The court held that, although the summons was served within the time limited by statute for commencing

Jan. 1903.] Opinion of the Court.—DUNBAR, J.

this class of actions, yet, as the complaint was not filed in the clerk's office within such time, the action was barred. Appellants refusing to plead further, respondent took judgment of dismissal, from which judgment this appeal is taken.

It is admitted that the action was not barred at the time the summons and a copy of the complaint were served, and it is conceded that, if that service is such a commencement of an action as will stop the running of the statute of limitations, the demurrer should not have been sustained. The appellants review the statute in relation to the commencement of actions from the passage of the first law in 1854 up to the last enactment, and insist that a harmonious construction of all the acts warrants the conclusion that an action is commenced for all purposes by the service of the summons. We are unable to adopt this view, but are inclined to think that a history of the enactments rather tends to show the independent character of § 4807, Bal. Code, which provides that, so far as the statute of limitations is concerned, an action shall be deemed commenced when the complaint is filed. Under the first enactment, it is provided that actions shall be commenced by filing a complaint and issuing a summons thereon, and there was no qualification in any respect. In 1863 the law was changed, and it was provided that civil actions should be commenced by service of copies of the complaint. Nor was there any qualification or limitation to this act, but, like its predecessor, it provided for the commencement of actions for all purposes. In 1869 the same provision in relation to the commencement of actions, viz., by service of copy of the complaint and notice, was enacted, with the provision, "An action shall be deemed commenced as to each defendant when the complaint is served on him." The next enactment in point provided that an action should

be commenced by filing a complaint and issuing summons thereon, and provided also that, for the purposes of the statute of limitations, an action shall be deemed commenced when the complaint is filed. This provision has remained in the law ever since, although the manner of commencement of actions has been changed; showing, it seems to us, that the intention of the law is that, no matter how or when actions may be commenced for other purposes, for the purpose of escaping the statute of limitations the complaint must be filed within the time prescribed. The provision is in the statute of limitations itself, and the language is plain and unequivocal, and, it seems to us, not susceptible of construction. The action not having been commenced in time, the demurrer to the complaint was properly sustained.

Judgment affirmed.

REAVIS, C. J., and FULLERTON, MOUNT and ANDERS, JJ., concur.

[No. 3866. Decided January 6, 1908.]

JOHN H. GAY, JR., *Appellant*, v. SAMUEL G. HAVERMALE *et al.*, *Respondents*, FIRST NATIONAL BANK OF CHICAGO *et al.*, *Appellants*.

LACHES — AVAILABLE WITHOUT SPECIAL PLEA.

Laches need not be specially pleaded as an equitable defense, but defendant may avail himself thereof, when laches is shown and claimed on the hearing of the facts.

APPEAL — REVIEW — FINDINGS OF FACT — PRESUMPTIONS IN FAVOR OF CONCLUSIONS OF LAW.

Where the evidence is not brought up in the record on appeal, the conclusion of the court that plaintiffs were guilty of laches

Jan. 1903.] Opinion of the Court.—**REAVIS**, C. J.

will not be disturbed, when the conclusion recites that it is based upon the findings and "all the evidence," as the presumption arises that the evidence supported the conclusion, although the findings may not be full and complete on that issue.

Appeal from Superior Court, Spokane County.—Hon. **WILLIAM E. RICHARDSON**, Judge. Affirmed.

R. L. Edmiston, J. O. Cull, A. E. Gallagher (*William T. Birdsall*, of counsel), for appellants.

Graves & Graves (*James Dawson and Hyde, Latimer & Barnes*, of counsel), for respondents.

ON REHEARING.

The opinion of the court was delivered by

REAVIS, C. J.—Plaintiff and cross complainants and respondents each having filed petitions for rehearing in this cause, it was again fully argued, both orally and upon briefs. Counsel for appellants urge that the cause must be considered alone upon their exceptions. The allusion in the former opinion (27 Wash. 390, 67 Pac. 804) to matters appearing in the transcript was merely intended to fully illustrate the case. It is an equitable action. As observed in the former opinion, the record does not contain any of the evidence. Thus no objections to the findings of fact can be considered. The only exceptions before us are to the conclusions of law, and to some rulings of the court in the settlement of the pleadings. It may be observed that the motion by plaintiff to strike certain portions of the affirmative defenses in the answers of the defendants Havermale were sustained by the court for the reason that such defenses could be proved under the denials already in the answers, and further consideration of these rulings is immaterial here.

In the consideration of the cause, and in the decision

rendered, the attention of the court was chiefly directed to the existence of laches as a principle for equitable cognizance in our courts since the adoption of the Code. We then announced that the principle of laches still inheres in the substance of equitable relief, and we are now content with such conclusion. The principle has frequently been recognized here. See *Cantara v. Blackwell*, 14 Wash. 294 (44 Pac. 657); *Sackman v. Campbell*, 15 Wash. 57 (45 Pac. 895); *Chezum v. McBride*, 21 Wash. 558 (58 Pac. 1067); *Kuhn v. Mason*, 24 Wash. 94 (64 Pac. 182).

Relative to the statement of the excusatory facts in the complaint, where unreasonable delay or other facts showing laches appear on its face, there seems to be some want of clarity in the expressions of this court. In *Chezum v. McBride, supra*, it was observed, "The action is barred by the laches of appellant and his grantees," and a quotation is made from *Mullan's Adm'r v. Carper*, 37 W. Va. 215 (16 S. E. 527), as follows:

"Delay in the assertion of a right unless satisfactorily explained, even when it does not constitute a positive statutory bar, operates in equity as evidence of assent, acquiescence or waiver."

In *Sackman v. Campbell, supra*, it was said:

"A number of objections are urged against this cause of action, one of which is that the plaintiffs' rights, if they ever had any, were barred by the lapse of time; that it fails to show sufficient reasons why the plaintiffs remained silent from the time they attained their majority until 1891, a period of over thirty years. The only answer to this is that Renton concealed the facts from them and represented that the property was his own. We are of the opinion that the demurrer to this cause of action was well taken. The complaint fails to show how the plaintiffs obtained their information in 1891, and the bare allegation that they had no knowledge of the facts prior to that time is overcome by the other matters pleaded."

Jan. 1903.] Opinion of the Court.—RAVIS, C. J.

In *Kuhn v. Mason, supra*, it was held that a motion to vacate a judgment would, in the discretion of the court, be denied where unreasonable and unexplained laches appeared on the face of the complaint. The case of *Stearns v. Hochbrunn*, 24 Wash. 206 (64 Pac. 165), is cited by appellant as contrary to the expressions made in the former cases. This case was an action for relief on the ground of fraud. The complaint alleged that the fraud was discovered within three years, but did not state what acts of diligence plaintiff used to discover the fraud, or the circumstances of its discovery, and why it was not discovered sooner. The complaint was held good against a demurrer, the court observing:

"It would seem from this that the statute intended that a complaint should be deemed sufficient when it contained a direct and positive statement of the time of the discovery of the fraud, without further negativing the idea that the fraud might have been discovered sooner; leaving it rather a rule of evidence than a rule of pleading, if it still be the rule that means of discovery is equivalent to actual discovery."

In the present case plaintiff and cross complainants set forth in their complaints and cross complaints excusatory facts, explaining that the frauds alleged against the defendants were not discovered or known until within three years before the commencement of the action, and defendants demurred on the ground of laches shown upon the face of the complaints. The demurrer was overruled. Such ruling upon the demurrer did not prevent the hearing of the facts which must have been before the court. It must be inferred, in view of the findings and conclusions made, that evidence was heard by the superior court. In the former decision it was said:

"But it is urged by counsel for respondents that, as the

finding is not inconsistent with the legal conclusion of laches, or the statement in the decree that it was based upon the findings and the evidence, this court must infer that the probative facts appeared in the evidence, and that the decree will not be reversed because the findings are insufficient. This contention would be more cogent if the pleadings disclosed the issue made upon facts properly alleged in the answer. The authorities cited by counsel, such as *Byers v. Rothschild*, 11 Wash. 296 (39 Pac. 688), 1 Black, Judgments, § 270, and *Thompson v. O'Neil*, 41 Cal. 683, do not present the case as here, where findings of fact are made which are in themselves insufficient to establish the conclusion, and where such finding as No. 40 is not within the issues presented in the pleadings."

On this review we do not think the finding No. 40 and the legal conclusions were so foreign to the issues suggested by the respective pleadings as to be entirely irrelevant. If evidence showing laches was introduced without objection, the pleadings could have been made to conform thereto. This court was then impressed that the findings of fact did not completely support a case for the application of the rule of laches, and observed that laches was in the nature of an equitable defense, by way of estoppel, and should have been specially pleaded in the answer. This observation seems to be misleading, and is not in accord with the views of the court in the cases which are mentioned above. The rule generally stated is that laches may arise on the hearing of the facts, when shown and claimed. Section 6535, Bal. Code, relative to appeals, provides, in substance, that amendments to the pleadings shall be presumed to be made if they ought to or could have been made in the trial court. *Allend v. Spokane Falls, etc., Ry. Co.*, 21 Wash. 324 (58 Pac. 244); *Kinkead v. Holmes & Bull Furniture Co.*, 24 Wash. 216 (64 Pac. 157).

Jan. 1903.] Opinion of the Court.—REAVIS, C. J.

In *Carpenter v. Barry*, 26 Wash. 255 (66 Pac. 393), it was said:

"The appellants assign as error the action of the court in rendering judgment in excess of the verdict. Inasmuch, however, as they have not brought up with their appeal either a statement of facts or bill of exceptions showing the circumstances under which the judgment was rendered, it is manifest that this question is not here for review. It is not error in every instance and under all circumstances for a court to enter a judgment in excess of a verdict; hence, before the appellate court can say it is error so to do in any particular case, sufficient facts must be shown to make it appear that the action of the court is unwarranted in that particular case. Error is never presumed. The record must show it affirmatively."

See, also, *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176 (68 Pac. 444); *Byers v. Rothschild*, 11 Wash. 296 (39 Pac. 688).

The rule has frequently been announced, if the findings are not all stated the presumption is still that the evidence supported the conclusion. The findings here tend to support the conclusion. The court bases the conclusion on the findings and "all the evidence." They were not so full and complete as to satisfy this court, upon their face, to sustain the conclusion of laches, and it was then concluded to remand the case for further amendments and findings. But on this review we now conclude that the superior court properly had the case before it, and the evidence must be presumed to justify its conclusions. The substantial objection to the judgment is that it is not supported by the facts, but the insufficiency of the facts has not been shown upon the record here, and, no substantial error having been shown, the decree is affirmed.

DUNBAR, FULLERTON, MOUNT and ANDERS, JJ., concur.

[No. 4201. Decided January 6, 1908.]

SPOKANE & VANCOUVER GOLD & COPPER COMPANY, *Appellant*, v. J. A. COLFELT *et al.*, *Respondents*.

TRIAL — NOTICE OF ISSUE — NECESSITY ON RETRIAL AFTER APPEAL.

Under Bal. Code, § 4970, which provides that "when a cause has once been placed upon either docket of the court, if not tried or argued at the time for which notice was given, it need not be noticed for a subsequent session or day," it is unnecessary to give notice of the trial of a cause which had been reversed on appeal and remanded to the lower court for a new trial.

SAME — DISMISSAL FOR FAILURE TO PROSECUTE — EXCUSE — ABSENCE OF COUNSEL.

Excusable neglect justifying the vacation of an order of dismissal for want of prosecution of an action is not established by a showing that counsel were engaged in other courts at the time the case was called for trial.

SAME — ABSENCE OF WITNESS.

The absence of a material witness will not excuse the failure of a party to appear on the day set for trial, when there is no showing of diligence to procure the attendance of such witness, nor any allegation of the facts expected to be proved by him.

Appeal from Superior Court, Skamania County.—Hon. ABRAHAM L. MILLER, Judge. Affirmed.

Robertson & Miller, for appellant.

C. D. Bowles and Pipes & Tiff, for respondents.

The opinion of the court was delivered by

MOUNT, J.—This case, upon a former appeal, was reversed and remanded to the lower court for a new trial (24 Wash. 568, 64 Pac. 847). Thereafter, on October 1, 1901, at a jury term of the lower court, the cause was called for trial, and, the plaintiff (appellant here) not being present, the cause was, on motion of the respondents,

Jan. 1903.] Opinion of the Court.—MOUNT, J.

dismissed. Appellant thereafter filed a motion to vacate the order of dismissal on the grounds (1) that no note of issue had been filed; and (2) excusable neglect. The motion was denied, and this appeal is prosecuted for review of these two questions.

The cause had once been regularly upon the trial calendar and tried, appealed to this court, reversed, and remanded for a new trial. Section 4970, Bal. Code, does not require more than one notice of issue, but provides:

"When a cause has once been placed upon either docket of the court, if not tried or argued at the time for which notice was given, it need not be noticed for a subsequent session or day, but shall remain upon the docket from session to session or from law day to law day until final disposition or stricken off by the court."

When the cause was reversed and remanded for new trial, it stood upon the trial calendar of the lower court in the same position it would have been in if a new trial had been granted by the lower court. No new note of issue was required. The former notice was sufficient until final disposition of the cause.

It is next alleged that appellant showed excusable neglect, (1) because its counsel were engaged in other business at that time in other courts; and (2) that one of its material witnesses could not be procured. Neither of these reasons is sufficient. Counsel must accommodate their business to the business of the courts, and not the courts to the business of counsel. Counsel for appellant had notice some five days prior to the beginning of the session that the court intended to hold a jury session of the court, and that the case would be called for trial, and was the only case upon the trial calendar. No showing is made of diligence to procure the witness claimed to be absent, nor was there any statement of the facts he was expected to swear to,

both of which were necessary to secure a continuance of the case.

We think the court did not abuse its discretion in the cause, and the judgment is therefore affirmed.

REAVIS, C. J., and DUNBAR, ANDERS and FULLERTON, JJ., concur.

[No. 4190. Decided January 7, 1908.]

THE STATE OF WASHINGTON on the Relation of T. C. Rush, Appellant, v. A. C. ST. JOHN, as Treasurer of Lewis County, et al., Respondents.

WARRANTS ON DITCH FUND — PAYMENT IN ORDER OF ISSUANCE — INTEREST.

Under Laws 1895, p. 144, § 7, which provides that warrants drawn on a ditch fund created by assessment for the payment of cost of construction of a ditch should be paid "in the order of their issue," and under Laws 1893, p. 76, which provides that all warrants shall draw interest from date of presentation and non-payment thereof, the holder of warrants against a ditch fund is entitled to their payment, with accrued interest, in the order of issuance, even if the payment of interest on such warrants prevents payment of subsequent warrants in the hands of other holders.

Appeal from Superior Court, Lewis County.—Hon. ALONZO E. RICE, Judge. Modified.

Forney & Ponder, for appellant.

David Stewart and *W. W. Langhorne*, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Relator seeks by mandamus to compel payment of certain warrants held by him and drawn upon

Jan. 1903.] Opinion of the Court.—REAVIS, C. J.

the Scheuber ditch fund of Lewis county. Intervenor Rice, who also holds warrants issued subsequently to those held by relator, appears and demands that all the warrants issued upon said ditch fund be paid *pro rata* and without interest thereon until said fund is exhausted. An agreed statement of facts is certified in the record. It appears that the Scheuber ditch was constructed in substantial compliance with the act of March 19, 1890 (Laws 1889-90, p. 652), and under the authority of such law the warrants in controversy were issued by the county commissioners, and were thereafter presented by the holders thereof to the county treasurer, and "not paid for want of funds" indorsed thereon. Warrants in the sum of \$7,009.57 were issued for the construction of such ditch, and are all unpaid. The law of 1890 was declared void in *Askam v. King County*, 9 Wash. 1 (36 Pac. 1097), and in *Skagit County v. Stiles*, 10 Wash. 388 (39 Pac. 116); but by the remedial act of March 19, 1895 (Laws 1895, p. 142), the defects of the former law were cured, and the latter act is valid. *Lewis County v. Gordon*, 20 Wash. 80 (54 Pac. 779). Under the act of 1895 the commissioners levied an assessment on the property benefited by the construction of the ditch, and certified the assessment roll on the 29th of November, 1899. There has been collected more than enough money to pay relator's warrants. Section 7 of this law (Laws 1895, p. 144), provides as follows:

"All moneys in said ditch fund shall be applied to the payment of any bonds issued by the county commissioners on the faith of said ditch fund, and to the payment of warrants issued for the construction of said ditch or drain and appurtenances and right of way in the order of their issue."

Under the act of March 7, 1893 (Laws 1893, p. 76), all warrants draw interest from date of presentation and non-payment thereof. The remedial act of 1895 plainly pro-

Syllabus.

[30 Wash.]

vides for the payment of the warrants theretofore issued in the order of their issuance, and for the amount due thereon, which includes the legal interest accrued from the date of presentation and non-payment. The warrants are payable out of any sum accumulated in the ditch fund. The fact that the ditch fund would be exhausted before all intervenor's warrants are paid does not affect the prior right of relator under the plain provisions of the statute. These considerations determine the controversy.

The judgment is modified, so that relator will receive payment of his warrants, including the interest thereon, and intervenor's warrants must be paid in the order of their issuance, in the same manner, so long as moneys are in the ditch fund. The cause is remanded for judgment in accordance herewith.

DUNBAR, FULLERTON and MOUNT, JJ., concur.

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[No. 4267. Decided January 7, 1908.]

J. F. McCORKLE, *Respondent*, v. HENRY MALLOREY, *Appellant*.

JOINDER OF ACTIONS — BREACH OF CONTRACT — CONVERSION.

It is not a misjoinder of causes of action to unite in one complaint an action for the recovery of damages for the breach of a contract, and an action which sets up the same contract and alleges that plaintiff, in order to fulfill it, erected certain buildings and camp equipment, and that defendant wrongfully took possession thereof and refused delivery on demand.

PLEADING — DEPARTURE — NEW MATTER IN REPLY.

New matter, not inconsistent with the complaint, constituting a defense to new matter set forth in the answer, may be alleged in the reply, without being open to the objection of being a departure from the cause stated in the complaint.

Jan. 1903.] Opinion of the Court.—MOUNT, J.

SPECIAL VERDICT — WHEN CONSTRUED TO SUPPORT GENERAL VERDICT.

Where a special verdict is susceptible of two constructions, one of which will support the general verdict and the other will not, such construction should be given as will support the general verdict.

JURORS — IMPLIED BIAS — RELATION OF ATTORNEY AND CLIENT.

A client of an attorney for one of the parties, called as a juror, is not subject to challenge on the ground of implied bias, under Bal. Code, § 4984, which provides that a challenge for implied bias may be taken when the juror stands in the relation of attorney and client to the adverse party.

DAMAGES — DOUBLE ASSESSMENT — BREACH OF CONTRACT AND CONVERSION.

In an action for damages for breach of contract to take logs cut by plaintiff on defendant's land, and for the conversion of plaintiff's buildings and camp equipment necessary in the performance of such contract, and which he was entitled to remove at the expiration of the contract, a verdict determining loss of profit under the contract and assessing damages for the appropriation of the buildings, etc., would not be a double assessment of damages.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Affirmed.

Troy & Falknor, for appellant.

W. I. Agnew, for respondent.

The opinion of the court was delivered by

MOUNT, J.—On August 20, 1900, appellant and respondent entered into an agreement by which respondent was to cut saw logs from certain tracts of land and deliver these logs to appellant at his saw mill. Two causes of action are alleged in the complaint: (1) That appellant had violated the terms of the contract by requiring respondent to cease work thereunder; and (2) that appellant had appropriated to his own use certain buildings and personal property used by respondent in performing the contract, and which were left by respondent upon the premises.

Damages were demanded for breach of the contract, and also for the value of the property taken. Upon a trial before the court sitting with a jury, a judgment was recovered by the plaintiff (respondent here) and defendant appeals.

It is claimed that the court should have sustained the demurrer to the complaint (1) because there was a misjoinder of causes of action, and (2) because the complaint did not state facts sufficient to constitute a cause of action. The complaint, for a first cause of action, alleged the contract and a breach thereof, and damages on account thereof. For the second cause of action, it alleged the same contract, and that plaintiff in order to fulfill his contract erected certain buildings and camp equipment on the premises, and that appellant wrongfully took possession thereof, and refused to deliver them to respondent upon demand. Both these causes of action arose out of the same matter, viz., the violation of the contract, and were therefore, under § 4942, subd. 1, Bal. Code, properly joined. The causes of action are separately stated, and each states a cause of action. The demurrer was properly overruled.

In the answer of appellant it was admitted that there was a contract entered into which was alleged to be in writing, a copy of which was set out in the answer. It was alleged that, by the terms of the contract, appellant was not required to take the logs at any particular time or in any particular quantity; that, when he refused to permit respondent to deliver logs for a certain time, he was acting within the terms of his contract, and there was, therefore, no breach thereof. Respondent in his reply denied that the contract was in writing, and denied that the contract set out in the answer was the contract between the parties, and alleged that the agreement was that respondent was to deliver logs at the rate of 15,000 to 20,000 feet per day,

Jan. 1903.] Opinion of the Court.—MOUNT, J.

being the estimated capacity of the mill. It is claimed that this last allegation is a departure from the allegations in the complaint, and that the court erred in refusing to strike the reply. It is true that it was not alleged in the complaint at what rate per day the logs were to be delivered to appellant at the mill; but it was alleged that the appellant, without cause and against the desire of respondent, ordered and directed respondent to cease logging operations, and refused to allow respondent to cut and deliver logs under the contract, although respondent was at all times ready and willing to carry out his part of the contract. The reply did not attempt to set up a different contract from the one alleged in the complaint, or one inconsistent therewith, nor to enlarge the ground upon which recovery was originally sought. In addition to denying the contract set up in the answer, it set out more fully what the respondent claimed the contract really was by way of denial of the right of appellant to terminate the same at his pleasure. New matter, not inconsistent with the complaint, constituting a defense to the new matter set forth in the answer, may be alleged in the reply. *Commercial Electric Light & Power Co. v. Tacoma*, 17 Wash. 661, 674 (50 Pac. 592); *Childs Lumber, etc., Co. v. Page*, 28 Wash. 128 (68 Pac. 373). It was therefore not error to refuse to strike the reply.

The principal question in the case, both upon the pleadings and upon the trial, was as to the terms of the contract, and whether or not it was in writing. Appellant claimed it was in writing, and respondent claimed it was not in writing. Both parties admitted that there was a contract, but disagreed as to its terms. It was not claimed that the written contract was ever executed, but appellant claimed that the writing alleged in his answer, and introduced in evidence at the trial, contained all the terms of

the contract, while respondent claimed that he had refused to execute the writing because it did not state all the terms thereof correctly, in this, to wit, that he was to be permitted to deliver 15,000 to 20,000 feet of logs per day. At the trial the court, at the request of appellant, permitted the following special interrogatory to the jury: "Did the contract, referred to in plaintiff's complaint as being made on August 20, 1900, contain the following clause: 'The logs to be delivered upon said landing as fast as required by said party of the first part, and of such length as ordered?'" The jury answered this interrogatory in the affirmative. It was not disputed on the trial that such provision was agreed to by both the parties, but the respondent claimed that the agreement contained more than that, viz., that he should in any event deliver 15,000 feet per day, and as much more as appellant should require. This is not necessarily inconsistent with the claim of respondent, and cannot be urged by appellant as being a finding by the jury that the terms of the contract were as claimed by appellant. If counsel for appellant meant to ask the jury by this question whether or not the contract was in writing, or if they meant to have the jury say that this provision was the whole of the contract upon that point, then the question was misleading, and evidently misunderstood by the jury, because in that event there was no breach of the contract, and the verdict should have been for the appellant. But the jury found that this provision was not the whole of the contract upon this point, because they found that there had been a breach of the contract and awarded respondent damages therefor. The only breach claimed by respondent was that appellant ordered him to cease logging for a time, and then requested respondent to begin again later, but to deliver only 5,000 feet per

Jan. 1903.] Opinion of the Court.—MOUNT, J.

day. These facts were admitted on both sides. Where a special verdict is susceptible of two constructions, one of which will support the general verdict and the other will not, that construction will be given the special verdict which will support the general verdict. It was therefore not error of the court to refuse a new trial on this ground.

It is next claimed as error that the lower court denied the challenge of appellant to a juror for implied bias. George W. Hopp was called as a juror, and qualified himself as a juror in the cause. He stated, however, that he was a client of Mr. Agnew, attorney for the respondent, in other pending litigation. Appellant thereupon challenged the juror for implied bias. This challenge was denied, and exception taken. Appellant submitted a peremptory challenge to this juror, and thereafter exhausted his peremptory challenges. Section 4984, subd. 2, Bal. Code, provides as follows:

“A challenge for implied bias may be taken for any or all of the following causes, and not otherwise. . . .
2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, to the adverse party.”

It is plain from this statute that an attorney of an adverse party may be challenged as a juror for implied bias, and, if the attorney were a party to the cause, his client would be subject to the same challenge. But, unless the attorney of a party to an action can be held to be an adverse party within the meaning of the statute, it does not apply. The words “adverse party,” as used in this section, clearly refer to the parties to the action,—the plaintiff and defendant, and are used to include both. The attorney of a party to the action is not an adverse party, within the meaning of this section, any more than any other employee may be said to be an adverse party. He simply repre-

sents one of the adverse parties. The statute certainly does not mean that a servant or tenant of the attorney for an adverse party may be challenged for implied bias, and yet, if a client in other proceedings may be challenged, the servant or tenant of the attorney for one of the parties may for the same reason be challenged. The statute, we think, clearly means that, where the relation of guardian and ward, or the relation of attorney and client, or the relation of master and servant, or the relation of landlord and tenant, exists between the juror and either of the parties plaintiff or defendant, then bias is presumed because of the confidential relations existing between these classes of persons. Where an attorney is a party, either plaintiff or defendant, his client may be challenged for implied bias; but, where the attorney is not a party to the action, a client in other causes, who is otherwise qualified, may not be challenged for implied bias. It is true this court, in *State v. Boyce*, 24 Wash. 514 (64 Pac. 719), said, "that a challenge for implied bias may be taken when it appears that the juror and the attorney are standing in the relation of guardian and ward, or attorney and client," etc. But this declaration was not for the purpose of construing the statute in question, because the construction of this statute was not involved in that case. It was a mere inadvertent declaration of what the court assumed the statute to be, without intent to construe it. In the case of *State v. McGraw* (Idaho), 59 Pac. 178, the supreme court of Idaho seems to have held that the statute of that state, which is practically the same as ours, means that the attorney for the defendant is included with the defendant, and that therefore a client of the attorney may be challenged for implied bias. But we cannot believe that such was the intent of our statute.

Jan. 1908.

Syllabus.

It is further claimed that the buildings and camp equipment were necessary to the work of logging; that the whole of plaintiff's damages were determined when the loss of profit under the contract was ascertained, and that, when the court permitted the jury to assess damages for the buildings, etc., appropriated by the appellant, there was a double assessment of damages. The respondent testified that the buildings were of a temporary character, and that he was to be permitted to remove them and the equipment at the expiration of his contract. The jury must have found this to have been the fact. The respondent was then entitled to his buildings and the equipment, or its value, in addition to the profit which he would have made under his contract. There was no double assessment of damages in this.

The discussion of errors above disposes of all the assignments of merit. There was no error in the cause, and the judgment is therefore affirmed.

REAVIS, C. J., and ANDERS and FULLERTON, JJ., concur.

[No 4334. Decided January 7, 1908.]

LILLIE L. BACHELOR, *Respondent*, v. JAMES BACHELOR,
Appellant.

DIVORCE — VENUE.

Under Bal. Code, § 5718, which authorizes actions for divorce to be brought in the county where plaintiff resides, the refusal to grant a change of venue to the county of defendant's residence would not constitute error.

SAME — REFUSAL TO PAY SUIT MONEY — EFFECT ON RIGHT TO DEFEND.

The failure of the defendant in a divorce proceeding to com-

Opinion of the Court.—DUNBAR, J. [30 Wash.

ply with the court's order for the payment of alimony and suit money to the plaintiff will not warrant the court in striking the defendant's answer, inasmuch as it is the policy of the law that divorces be not granted without the interposition of defenses to the action.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Reversed.

Govnor Teats and E. W. Taylor, for appellant.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal from a judgment for divorce, and more particularly from the action of the lower court in refusing the defendant a right to defend and to appear in court because of his inability or neglect to pay an attorney's fee and suit money in the sum of \$60 adjudged by the court.

The first assignment is that the court erred in overruling the application and motion of defendant for a change of venue. Section 5718, Bal. Code, provides that, "any person who has been a resident of the state for one year may file his or her complaint for a divorce or decree of nullity of marriage, under oath, in the superior court of the county where he or she may reside, and like proceedings shall be had thereon as in civil cases." It is shown by the complaint in this case that the plaintiff has been a resident of Pierce county for more than a year immediately preceding the commencement of this action. There was no error in overruling this motion.

Nor do we think that the court erred in overruling the demurrer to the complaint. The complaint was sufficient to state a cause of action.

Nor are we inclined to interfere with the action of the court in ordering and directing the defendant to pay to the attorney for the plaintiff the sum of \$60, or in ordering the

Jan. 1903.] Opinion of the Court.—DUNBAR, J.

defendant to show why he was not in contempt of court for failing to obey the order of the court to pay to the attorney of the plaintiff, for the plaintiff, said sum of \$60. The court, however, upon the motion of the plaintiff, ordered the answer and cross complaint of defendant to be stricken, for the reason that the defendant was in contempt of court in not paying the alimony theretofore adjudged to be paid by the court. This we think was reversible error, under uniform authority. The authorities are divided in ordinary cases upon the question of the court's authority to refuse to permit a defendant to answer, where the defendant is in contempt of court and has not purged himself thereof; but there is no conflict in authority, we think, in a divorce proceeding, in which the public, as well as all individuals, have an interest. The law provides that in undefended divorce cases the prosecuting attorney shall appear and defend on behalf of the state. But this is frequently, in practice, not an effective defense. In *McMakin v. McMakin*, 68 Mo. App. 57, the court, in discussing the general question of the powers of courts to refuse to hear defendants when in contempt of court by disobeying its orders, and asserting that such was the general rule prevailing in courts of equity, said:

"But while this is so, we do not think it applicable in divorce cases, for the reasons given by the supreme court of Illinois, in *Gordon v. Gordon* [141 Ill. 160]. Besides this, an action for divorce is triangular—one in which the married parties are plaintiff and defendant, and the public occupies, without being mentioned in the pleadings, the position of third party. The interest of the latter blends with that of various third persons not before the court. Of such, for example, are the children born, or *en ventre sa mere*. Since they cannot protect themselves, the public, represented by the court, is under duty to protect them. The justice of the plaintiff's complaint must be established,

not merely between the parties to the record, but as between them and the public, including persons specially interested, yet not before the court;"

citing 2 Bishop, *Marriage & Divorce*, §§ 489, 495, 498, and *Owen v. Owen*, 48 Mo. App. 208.

It is said in *Baily v. Baily*, 69 Iowa, 77 (28 N. W. 443), that, where a party declines or fails to defend a suit, a divorce may be obtained on the evidence introduced by the plaintiff alone; but, where a party actually desires to defend, and files pleadings controverting the ground relied on, public policy requires that he have the opportunity to be heard.

It was decided in *Cason v. Cason*, 15 Ga. 405, that the neglect or refusal of the defendant to comply with the order of the court requiring him to pay temporary alimony pending the divorce did not authorize the court to deny to the party his right to defend the libel. As directly sustaining this doctrine we cite: *Johnson v. Superior Court*, 63 Cal. 578; *Gordon v. Gordon*, 41 Ill. App. 137; *Eastes v. Eastes*, 79 Ind. 363; *Allen v. Allen*, 72 Iowa, 502 (34 N. W. 303); *McCrea v. McCrea*, 58 How. Pr. 220; *Peel v. Peel*, 50 Iowa, 521; *Baily v. Baily*, 69 Iowa, 77 (28 N. W. 443).

For error in this respect the judgment will be reversed, with instructions to the court to allow the defendant to answer.

REAVIS, C. J., and FULLERTON, ANDERS and MOUNT, JJ, concur.

Jan. 1903.] Opinion of the Court.—FULLETON, J.

[No. 4353. Decided January 7, 1903.]

THE STATE OF WASHINGTON *et al.*, Respondents, v H. T. DENHAM, Appellant.

CONTEMPT — ORDERS OF COURT — FAILURE TO OBEY.

Failure to comply with an order of court directing that the property of a corporation be turned over to a receiver will not subject a person to punishment for contempt, where he was not a party to the proceeding in which the receiver was appointed and in which the order was made, and where he retains possession of the property in good faith in the belief that it probably belongs to others than the corporation.

APPEAL — DOUBLE JUDGMENTS — REVERSAL OF BOTH TO CLEAR RECORD.

Where two journal entries of a final judgment were entered under different titles, the second entry being made to correct some inadvertence in the first, but without ordering its cancellation, and appeal was taken from both judgments, the supreme court will, on reversing the judgment, direct a reversal on each appeal, in order to clear the record.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

William P. Reynolds and Arthur Remington, for appellant.

James J. McCafferty, for respondents.

The opinion of the court was delivered by

FULLETON, J.—The appellant was found guilty of contempt, and appeals from the judgment and sentence pronounced upon him. The record discloses that on April 14, 1902, in an action brought by M. Blanton against the Tontine Savings Association, a corporation, J. A. Paine, was duly appointed permanent receiver of the property and effects of the corporation, and duly authorized to take possession of all of its property. The order appointing him

such receiver contained, among others, the following recital:

"And all other persons having, if anything, in his or their or its possession, and under his or her or its control, any books, papers, personal property, accounts, money, or assets of any and every kind, name, nature, or description whatsoever, be, and they are hereby, ordered and directed forthwith to immediately turn the same over to the said receiver above named, upon demand."

Thereafter, on April 22, 1902, the receiver made and filed with the court an affidavit in which he averred, in substance, that he had heard that the appellant, who resided in the city of Tacoma, had in his possession money and property belonging to the corporation of which he was receiver; that he called upon the appellant, and exhibited to him the order of court showing his appointment and qualification as receiver, and demanded of him such property; that the appellant requested that the receiver go with him to see his attorney, whom he wished to consult regarding the matter; that they did go to the attorney's office, where the appellant stated to him that he had in his possession, belonging to the Tontine Savings Association, certain books of account, stubs, contracts, and other papers, together with a sum of money amounting to between \$7,000 and \$8,000, a part of which he was in doubt as to whom it properly belonged,—whether to the persons who paid the money over to him, or to the corporation,—and that he wished time to segregate it, and would then turn over to him such as he found belonged to the corporation; that a few days later he received a telephone message from the attorney, saying that he and the appellant had been very busy, and unable to make out the account in full, but would report and deliver the money and property on Tuesday, the 22d of April, 1902; that on the 22d of April the

Jan. 1903.] Opinion of the Court.—FULLERTON, J.

attorney called upon him and informed him that he had concluded that the property did not belong to the corporation, and that he would not turn it over or deliver it to the receiver until the further order of the court. He prayed that the court instruct him what further to do in the premises. This affidavit was presented to the court on the 24th of April, who ordered that the appellant appear on the next day and show cause why he should not be punished as for contempt. The appellant appeared by his counsel only, who sought to raise certain questions going to the jurisdiction of the court and the sufficiency of the proceedings; but these were overruled, and the appellant fined, in spite of the assumption on the part of the attorney of responsibility for the acts of his client, and his disclaimer of any intent to be discourteous, disobedient or contemptuous.

Passing by the questions raised as to the regularity of the proceedings had at the hearing of the cause, we are unable to find elsewhere in the record anything which justifies the judgment appealed from. It must be borne in mind that the appellant was not a party to the action in which the receiver was appointed, and that the general order above quoted was not directed to him specially. He could not be guilty of a disobedience of that order, therefore, unless he willfully withheld property, after demand and notice, which confessedly belonged to the corporation. For property in his hands which he in good faith believed belonged to others, and to whom he would be responsible if it did in fact belong to them, he cannot be punished for contempt for retaining, even though it afterwards turned out that he was wrong in his belief. In other words, contempts punishable by fine and imprisonment partake of the nature of crimes, and a wilful intent to commit the con-

temptuous act, as well as the commission of the act itself, must be shown, in order to constitute the offense. The affidavit, which alone must furnish a justification for the punishment of the appellant, falls far short of making a case coming within these requirements. While it is true that it recites that the appellant at one time admitted that he had property belonging to the corporation, and promised to ascertain the amount and turn it over to the receiver, it nowhere avers that he actually has such property; and it is apparent from the affidavit, as a whole, that he afterwards concluded differently, and refused to turn the property over because he believed that persons other than the receiver were entitled to it. There is nothing in the record that impugns his good faith, or the good faith of the attorney who advised with him. There was not, therefore, a willful withholding of property which confessedly belonged to the corporation, nor was there a disobedience of an order directing this particular property to be turned over to the receiver. It would seem that the remedy of the receiver, under the circumstances, lay in some form of civil action in which the rights of the parties to the property could have been tested; but, be this as it may, we are clear there is no showing which justified finding the appellant guilty of contempt.

It appears that two journal entries of the final judgment were filed and entered in the court below, under different titles, and that appeals have been prosecuted from both of them, which appear in this court as separate causes. There was, however, but one final judgment; the second entry being made to correct some inadvertence appearing in the first, but without ordering its cancellation. To clear the record, it is ordered that the judgment appealed from be reversed on each appeal, and that the cause be remanded,

Jan. 1903.Syllabus.

with instructions to dismiss the proceedings against the appellant.

REAVIS, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4855. Decided January 7, 1908.]

W. H. Ross et al., Appellants, v. PORTLAND COFFEE & SPICE COMPANY, Respondent.

CONTRACT OF EMPLOYMENT — ADMISSIBILITY OF PAROL TO VARY.

Where a written contract for commissions to a salesman provides that goods returned by customers shall not be considered as sold, nor the salesman entitled to commissions thereon, and, further, that defendant reserves the right to reject any and all orders for any good and sufficient reason, parol evidence is inadmissible for the purpose of showing that defendant agreed as an inducement to the contract that the salesman should have a commission on all orders sent in and accepted by defendant.

SAME — SALESMAN — RIGHT TO COMMISSIONS.

Where a salesman's contract for commissions provided that he should be paid monthly on all sales made during the preceding month, but that goods returned by customers should not be considered as sold, the salesman is entitled to commissions only upon that portion of an order for goods delivered to the customer and retained by him, when the terms of the order provided that part of the goods were to be delivered at a certain time and the "balance as ordered," and that goods should be sent under a warranty, subject to the customer's approval.

SAME.

Under a contract giving a salesman commissions at the end of each month on the sale of goods made by him, if not returned by the customer, he is entitled to commissions upon orders taken by him which were enforceable on the part of the vendor as binding contracts of sale, although providing for future delivery, if the order provided for their shipment on or before a certain date, and contained no conditions as to approval or right of countermand by the customer.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

Remsberg & Simmonds, for appellants.

Cake & Cake, and *Peters & Powell*, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—The respondent is a wholesale dealer in teas, coffees, spices, and other groceries. On the 5th day of November, 1899, it entered into a contract with one Posson, whereby he was to act as traveling salesman for respondent's goods from date of contract up to and including December 31, 1900,

"in that territory commonly known as the 'Sound Territory,' the Columbia River between Portland and Astoria, and that portion of Eastern Oregon not now occupied by said company's representative, and to cover and canvass said territory as the party of the first part may direct, and is to sell goods, wares, and merchandise carried in stock by the said party of the first part, consisting of teas, coffees, spices, etc., as directed by the said party of the first part. The said party of the second part to receive as his compensation for said services as commission on all goods so sold by him, the said party of the second part, as follows: Mocha and Java coffees, 15 per cent.; other coffees, teas, spices, baking powder, etc., 12½ per cent.; Arbuckle and Lion coffees, soda, chocolates, cocoas, 5 per cent. on the selling price of said goods.

"It is understood that goods returned by customers shall not be considered as having been sold, and therefore the party of the second part shall not be entitled to commission thereon.

"It is further agreed that all commissions are to be paid by the party of the first part to the party of the second part at the end of each month for sales made by the said party of the second part during said month; the said party of the first part to be allowed about ten days into the succeeding

Jan. 1903.] Opinion of the Court.—REAVIS, C. J.

month to make up statements, and determine amount of commission due the party of the second part for such sales made as aforesaid.

"It is further covenanted that the said party of the second part is to make no collections from any of the customers of the said party of the first part for goods sold for said party of the first part by said party of the second part, or otherwise, unless expressly directed and authorized so to do by the said party of the first part; and the said party of the first part reserves the right to reject any and all orders taken by the said party of the second part in event any of such orders are considered unworthy of credit by the said party of the first part, or for any other good and sufficient reason.

"It is further understood and agreed that the said party of the second part shall reside either in Seattle or Tacoma, Washington, during the continuance of this contract.

"Finally, the said party of the first part hereby reserves the right to annul and terminate this contract if the said party of the second part fails to prosecute the duties of his position in a diligent manner, or fails to be temperate and honest, or to account to said party of the first part for any and all transactions had and done for the said party of the first part by the said party of the second part by reason of this contract."

Posson entered into the employ of respondent under the contract, and continued until its expiration. It was his duty to solicit orders for goods of the respondent. There were two forms of orders, one for coffees, spices, etc., of which the following, a copy of Exhibit C 1, is an example:

"

Jany. 13, 189

Order No. —

Portland C & S Co
Ship to Puget Sound Gro Co
At Tacoma Wash
How ship — When —
Terms 3 Mo
10 Bbls M & J — 25

25 lbs free, each Bbl.

Ship 2 50-lb. tins at once, balance as ordered.

This coffee to be as good as any M & J on the market or order will be countermanded.

Puget Sound Gro Co."

And one for teas, of which the following, a copy of Exhibit H, is an example:

" Seattle 8/7-00

PORTLAND COFFEE AND SPICE Co.,

Portland, Oregon.

Gentlemen:

Please book our order for the following Tea, on conditions specified on margin hereof:

(Here follow items of the order)

To be shipped as follows: Del. in Seattle at times hereafter specified, and 2c per pound to be deducted from whole order when last shipment made.

Terms: 90 days, or 3 per cent. for cash.

Signed K. & McK."

Margin

"IMPORT TEA ORDER."

Not subject to change or countermand, and prices named do not include war tax or duty, and it is understood and agreed that same is to be added to bills, whatever it may be at time of shipments,—and entire order is to be shipped on or before Mch 1st, 1901."

These orders were signed by the customers; the customer retaining the original, and the agent keeping a carbon copy. From this copy the agent would fill out an order sheet, which was sent to the respondent. On the 25th day of March, 1901, or nearly three months after Posson had ceased to be an employee of defendant under said contract, he assigned all his rights under the contract to the plaintiffs herein.

The complaint, after setting out the contract and assignment, alleges:

Jan. 1903.] Opinion of the Court.—REAVIS, C. J.

"That the said Guy Posson has faithfully and in all things kept and performed the covenants and conditions on his part to be kept and performed under and by virtue of the terms of said contract, but that the said defendant has wholly failed, neglected, and refused to pay to said Guy Posson, or to these plaintiffs, the amount of commission due to these plaintiffs as the assignees of said Guy Posson, and that there is now due and owing to these plaintiffs, as the assignees of said Guy Posson, a large sum of money, to-wit, the sum of four thousand (4,000) dollars."

The answer denies the allegations of the complaint, and alleges:

"That this defendant heretofore, and prior to any assignment to the plaintiff by the said Guy Posson of any claim or demand of any commissions earned by him under and in pursuance to the contract between said Guy Posson and these defendants set forth in plaintiffs' complaint, or any other claim or claims arising under and by virtue of the terms of said contract, has fully settled with the said Guy Posson for any and all amounts due him as commissions or otherwise, and for all claims arising or to arise under and by virtue of the terms of said contract, and has prior to any such assignment fully paid the said Guy Posson for all amounts so due to him as aforesaid, in full satisfaction for all commissions or other claims under said contract."

The affirmative defense was denied in the reply. The issues were joined, and at the trial plaintiffs sought to introduce in evidence all orders solicited by their assignor. This was objected to, except so far as such orders showed goods actually shipped. The objection was sustained, and at the close of plaintiffs' evidence it was agreed between the parties that goods actually ordered for shipment, and shipped by the defendant on orders solicited by plaintiffs' assignor, were in such amount as to allow plaintiffs to recover commission on such sales in the sum of \$50 in excess of payments that had been made to plaintiffs' assignor.

Opinion of the Court.—REAVIS, C. J. [30 Wash.

Thereupon the court instructed the jury to return a verdict in such amount. Plaintiffs objected to such instruction and to the verdict.

The first assignment is that the court erred in rejecting parol evidence to explain the written contract. Plaintiffs desired to show that defendant held out to Posson, prior to and as an inducement for entering into the written agreement, that he was to receive commission on all orders sent in to defendant and accepted by it. We think the court made no mistake in refusing this offer. The general rule is that parol evidence is not admissible to supply, contradict, enlarge, or vary the words of a written contract, and when a contract is reduced to writing all matters of negotiation and discussion of the subject antecedent to the writing are excluded, being merged in the written instrument. Here the contract is unambiguous, and, taken as a whole, it needs no extrinsic light to explain its meaning. Unless both parties acted as if interpreting the contract as the plaintiffs contend it should be interpreted, the parol evidence offered was not admissible, as it tended to set up a different contract. That both parties to the contract did not act under it as plaintiffs contended is evident from the fact that plaintiffs attempted to prove a controversy over this very matter in dispute here between defendant and Posson a short time after the making of the contract. It is concluded that the parties are bound by the terms of the contract.

The other errors assigned must be disposed of in the light of such contract. The contract provides for the payment of commissions at the close of each month, or shortly thereafter, on all sales made during the month just ended, and "it is understood that goods returned by customers shall not be considered as having been sold, and therefore the party of the second part shall not be entitled to com-

Jan. 1903.] Opinion of the Court.—REAVIS, C. J.

mission thereon." Thus by the contract the goods are not to be considered sold if the customer returns them, and conversely, if the goods were kept by the customer, they were to be considered sold, and the agent entitled to his commission. Orders were for so many drums of coffee, or pounds of spice or other goods, part to be delivered at a certain time, and balance *as ordered*, and goods to be sent under a warranty, and subject to the customer's approval. Until the customer had accepted the goods, by failure to return them, no commissions were due the agent. How a customer could have a chance to return goods until received by him, is not pointed out by the appellants. The tea contracts, however, were different. The tea was not to be shipped on approval, as were those goods called for in the coffee contracts. They were contracts for a definite quantity of goods to be taken within a specified time, for a price certain. It is true, there was an indorsement that the tea was to be shipped as ordered by the purchaser, but it was agreed that all must be shipped on or before a certain date. It was an order for goods to be shipped, part at time of giving the order, and balance to suit customer, within a date certain. If the balance had not been ordered before the time stated in the contract, the defendant could have shipped the goods and collected for the same. The customer could not change or countermand the order. If the tea had been shipped on approval, and the customer had the right to return the same if not satisfactory, it would seem that the provisions of the contract between defendant and Posson, providing that no commission should be earned on goods returned, would govern, and no claim for commission would lie until the customer had accepted the goods. "It is understood that goods returned by customers shall not be considered as having been sold," and of course, if not returned, were sold. But with the tea the customer had no option.

He was bound to accept it all within a certain time. Tiedeman defines a sale as "a contract or agreement for the transfer of the absolute property in personality from one person to another for a price in money." Tiedeman, Sales, § 1. The sale of tea was an enforceable contract when accepted by the defendant, and was in all respects a sale, either present or future.

There was no error in the ruling on the coffee contracts. But the tea contracts, or so much thereof as the company accepted, represented sales under the contract between defendant and Posson and entitled the latter or his assignees to commission, and evidence thereof should have been admitted.

Reversed and remanded for a new trial in accordance herewith.

ANDERS, MOUNT, FULLERTON and DUNBAR, JJ., concur.

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[No. 4442. Decided January 7, 1903.]

ARTHUR GOE, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

NEGLIGENCE — ACCIDENTAL INJURY — PROXIMATE CAUSE.

Where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, and which would not have resulted in the injury excepting for a negligent act of the defendant, such negligence is the proximate cause of the injury, for which damages are recoverable.

SAME — INJURY TO SERVANT — SAFE PLACE TO WORK — QUESTION FOR JURY.

Where a common laborer, employed in a gravel pit in connection with the work of a steam shovel, ignorant of the mechanical structure of the boom and crane attached to the shovel, is ordered

Jan. 1903.] Opinion of the Court.—DUNBAR, J.

by the foreman to go out upon the boom to assist in righting things after the overturning of the shovel, without being warned of the dangers of the position, and, by reason of the slippery condition of the boom, falls and strikes the lever of the crane engine, thereby starting the machinery in motion, and in throwing out one hand to recover himself has it caught and ground in a cog wheel, the danger of the sudden starting of the crane engine being capable of avoidance by having the steam shut off completely by a valve for that purpose between the crane engine and the main engine of the shovel, a question of fact as to defendant's negligence is presented for the consideration of the jury, and it is for them to determine, from such a state of facts, the proximate cause of the injury. (ANDERS, J., dissents.)

Appeal from Superior Court, Lewis County.—Hon. ALONZO E. RICE, Judge. Affirmed.

B. S. Grosscup and James F. McElroy, for appellant.

Maurice A. Langhorne (C. H. Forney, of counsel), for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal from the judgment of the superior court of Lewis county in favor of respondent for the sum of \$1,500 and costs. Respondent was employed by appellant as a common laborer. His duties were to assist as such laborer in the operation of a steam shovel at Skookum Chuck gravel pit, near Centralia, in Lewis county. He had been working at such employment for five days at the time of his injury, assisting in leveling the track, setting jack blocks, and other such work. Foster was foreman of the work, and had supervision over all the men. Shortly prior to the injury to the respondent, the steam shovel had tipped over, and the men, under the supervision of Foster, were engaged in righting the machinery to resume the work. The machine consists of a boom, a crane, and a dipper arm, to which is attached the dipper or

shovel. The boom is a stand mounted on wheels running on a track out into the gravel pit. The crane is a movable arm attached to the boom. The boom is run by a main engine inclosed in a car. The crane is worked by a smaller engine, called the "crane engine," stationed at the foot of the boom. Power is furnished to the crane engine by a steam pipe running from the larger engine, and is controlled by a globe valve or shut off directly over the head of the crane engineer. The crane engine is manipulated by a throttle lever at the cranesman's hand. The steam may be shut off from the crane engine alone, or it may be shut off back of the crane engine between there and the main engine. At the time of the accident to the machinery, under the order of Foster, the superintendent, the cranesman was sent from his particular post of duty to assist in putting things in order above, leaving the lever unguarded and unlocked. The steam was not shut off at the valve, being shut off from the crane engine only. The respondent was called by the superintendent, Foster, from his place of work in the gravel pit, and ordered to ascend the boom, and assist there in replacing some machinery that had slipped out of place. In attempting to obey the order, he stepped on the lower part of the boom, which was wet from rain, slipped and fell,—he having on rubber boots at the time,—struck against the unguarded lever, and set the machinery in motion. In attempting to save himself, his hand came in contact with the cog wheel, which, proceeding to revolve, ground off his thumb.

It is not contended by the appellant that the respondent was guilty of contributory negligence, and there is none shown by the record; but it is strenuously insisted that there was no proof of negligence on the part of the appellant, and that the injury sustained was the result of an

Jan. 1903.] Opinion of the Court.—DUNBAR, J.

accident for which no one is responsible. It is not necessary to enter into a discussion of the familiar principles, so often and so uniformly asserted by this court, that it is the duty of the master to furnish the servant a reasonably safe place in which to work, that the servant assumes the risks of apparent dangers of the employment, that the employer is not an insurer of the safety of the servant, and that the servant is bound to use his faculties and exercise his common sense to avoid dangers. These may all be conceded as the accepted doctrines of this court, and, if it appeared in this case, as it did in *Bullivant v. Spokane*, 14 Wash. 577 (45 Pac. 42), cited by appellant, that the injured employee could have seen and appreciated the perils to which he was exposed in his employment, the judgment would have to be reversed. But the record does not show that the respondent was aware of the danger which beset him, and which was the cause of his injury, for he testified that he was not acquainted with the machinery of the crane; that he had not been on it before, and had not paid any attention to its working, his attention having been absorbed by his own duties; and that he had not been notified of the danger when he was sent upon the crane to work. So that the questions of apparent dangers and prudent actions on the part of respondent are eliminated from the case on appeal, the jury having passed upon those questions under competent testimony and legal instructions. The main insistence is that the injury was caused by an accident, for which the appellant was in no way responsible; and it is argued that, if it had not been for the accident of falling, supplemented by the accident of striking the lever, still further supplemented by the fact of the respondent throwing his hand on to the cogs, no injury would have been sustained. This may be conceded without settling the question of proximate cause, for it is well estab-

lished that, where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the injury, or if the accident would not have resulted in the injury excepting for the negligent act, the negligence is the proximate cause of the injury for which damages may be recovered. That doctrine does not conflict with the rule requiring the plaintiff to use ordinary care and diligence. This rule was followed by this court in *Gray v. Washington Water Power Co.*, 27 Wash. 713 (68 Pac. 360), and has been announced in later decisions. So that the ultimate and controlling question in this case is not the question of the accident, but the question of whether or not it was negligence on the part of the appellant to send the respondent to work upon the crane without shutting the steam off from the main engine, and without notifying him of the mechanism of the crane, or warning him of the danger from striking the lever. In *Doyle v. Chicago, etc., Ry. Co.*, 77 Iowa, 607 (4 L. R. A. 420, 42 N. W. 555), where a coupling pin had been left by the company's employees on the track, and was hurled from the track by a passing train, and injured the plaintiff, a judgment for damages was sustained; the court saying the fact that the accident was an unusual one would not relieve the defendants from responsibility for the negligent act which might result in danger in many ways.

The decision of this case is not without difficulty, but, considering the fact that the respondent, who did not know the mechanical structure of the crane, was sent upon it without warning; that a lever of two and one-half feet was left unprotected and unguarded, the engineer, whose duty it was to operate and control it, having been called away from it; and that the mere touching of this lever would start in motion machinery which was dangerous to those

Jan. 1903.] Opinion of the Court.—DUNBAR, J.

working around, it does not seem to us that this court can say as a matter of law that there was no negligence, or that, conceding the truthfulness of respondent's testimony, there could be no difference of opinion in honest minds as to whether negligence could be inferred. The case would not have been any more favorable to appellant, it seems to us, if some one else, who had been ordered or permitted by the superintendent to go there, had, by accident or mismanagement, struck the lever and set the machinery in motion, thereby causing the same injury to respondent. In such case, the respondent being rightfully where he was sent, and his action in falling eliminated, it would seem to us that the question of negligence would properly be submitted to the jury. There certainly was a perfectly safe way to do this work, viz., by cutting off the steam between the crane engine and the main engine. It might possibly have taken a few minutes longer, but brief time is not to weigh against the safety of the workmen. On the question of the necessity of having the steam from the main engine on, the testimony of both the plaintiff and defendant was exceedingly evasive and unsatisfactory, and the question was a proper one to be submitted to the jury.

On the whole we are inclined to think, under the rules we have so often announced and under the rule announced by the supreme court of the United States in *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, viz., that what is the proximate cause of an injury is ordinarily a question for the jury; that it is not a question of science or of legal knowledge, but is to be determined as a fact, in view of the circumstances of fact attending it,—that there was sufficient testimony on the question of negligence to be submitted to the jury.

We do not think, under the uniform rulings of this

court, that the question of fellow servant is involved. According to the testimony of Foster, which was uncontradicted, he was the superintendent of the appellant, and every one, including both engineers, worked under his orders.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON and MOUNT, JJ., concur.

ANDERS, J. (dissenting).—I am constrained to dissent from the conclusions announced by my associates in this case for the reason that, upon the facts disclosed by the record and clearly stated in the opinion of the majority of the court, I am unable to see wherein the appellant was guilty of any negligence whatever. It does not appear that the engine was defective in any of its parts, or that it was not being used with ordinary care. It is evident that the respondent would not have been injured as he was if the engine had not been put in motion by the application of external force to the throttle lever, which was designed and used to start and to stop it. And I think it may be said, as matter of law, under the circumstances revealed by the record, that it was not incumbent on the appellant to anticipate or provide against the possibility that the respondent might voluntarily or involuntarily move the lever, and thus set the machinery in motion. He was not called upon to do anything involving the use of the lever, or even the engine, and hence there was no occasion or duty to warn him not to meddle therewith. In short, it seems to me that respondent's injury was the result of a mere accident, for which appellant ought not to be held responsible; and, if I am correct in this conclusion, it follows that this case does not fall within the rules announced in the cases cited in the majority opinion.

I think the judgment should be reversed.

Jan. 1903.] Opinion of the Court.—REAVIS, C. J.

[No. 4220. Decided January 10, 1903.]

NEW YORK SECURITY & TRUST COMPANY, Respondent, v.
CITY OF TACOMA, Appellant.

30	661
35	639
35	640
30	661
140	84

MUNICIPAL CORPORATIONS — TRUSTS — DIVERSION OF SPECIAL STREET FUND — LIMITATIONS.

Section 158 of the charter of the city of Tacoma, which provides that "all moneys received or collected by the treasurer upon assessments for improvements of streets, highways or alleys shall be kept as a separate fund and in no wise used for any other purpose whatever, except for redemption of warrants drawn against such fund," creates a trust relation between the city and a warrant holder, and where the city pays moneys out of such fund to a subsequent warrant holder, contrary to the statutory requirement that warrants should be paid in the order of issuance, the statute of limitations will not begin to run against action by the prior warrant holder to recover the amount due him from the city, until his discovery of the action of the city. (FULLESTON, J., dissents.)

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Affirmed.

William P. Reynolds and Emmett N. Parker, for appellant.

Stiles & Nash, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—In 1892 the defendant city of Tacoma entered into an agreement with certain contractors to grade and construct sidewalks on one of its streets, and agreed to pay for such street improvement by issuing and delivering to the contractors warrants drawn on the special improvement fund to be raised by local assessment on the property benefited by the improvement. The contractors performed the required conditions of the contract on their part, and from time to time, as the work was completed

and accepted by defendant, the warrants drawn on the improvement fund were delivered to the contractors in payment. Among the warrants so drawn and delivered was the one on which this suit is based, in the following form:

"\$2,100.

No. 120.

Tacoma, Wash., July 16th, 1892.

By order of the City Council of the City of Tacoma, the treasurer of said city will pay E. C. Burlingame Cont. Co., or order, from the street fund the sum of twenty-one hundred & no 100 dollars for Boulevard, Porter st. to east line Hope Park Addition."

This warrant was presented to the city treasurer on August 2, 1892, and indorsed, "Not paid for want of funds." The warrant was thereafter transferred to the plaintiff. Partial payments were made by defendant and indorsed on the warrant as follows: "Aug. 19, 1896, the sum of \$269.80; on May 20, 1897, the sum of \$56.35, and on Aug. 27, 1901, the sum of sixty-four cents." While such warrant was so held by plaintiff, and due and payable out of said special fund, and while sufficient money had been collected to pay the full amount thereof, the money so collected in such fund was paid out by the treasurer upon other warrants issued upon the same fund subsequently to plaintiff's warrant. No notice or call for the payment of the warrants was at any time given, and plaintiff had no knowledge of the application of the money to the subsequently issued warrants until a short time prior to the commencement of this action. The action is brought to recover the amount due on plaintiff's warrant.

The defendant demurred generally to the complaint, and, such demurrer being overruled, answered, pleading the statute of limitations against the demand made by plaintiff. The plea of limitations raises the only issue before us for consideration. It is conceded by the parties

Jan. 1903.] Opinion of the Court.—REAVIS, C. J.

that, if the statute is applicable to the facts found, the action was not commenced within time. The contention of the defendant city, briefly stated, is that the special improvement contracted for constituted no debt or charge against the city; that, if the city is liable for the payment of the amount of the warrant, it is as for damages for misappropriation or diversion of a special fund belonging to the plaintiff, and, as such action for damages is within the bar of the statute of limitations, that plaintiff's right of action accrued when the money was wrongfully diverted from the payment of the warrant; and that the statute runs from that date. It may be conceded that the warrant created no debt against the city, and that any recovery permissible is for the wrongful diversion of the special fund applicable to the payment of the warrant. In considering the controversy, the relations of the city with the plaintiff must, we think, be controlling. The duty of the proper disbursement of its special improvement fund was imposed on the city. The general law requires the payment of these warrants in the order of their issuance. The charter of the city of Tacoma (1890), § 158, reads:

“All moneys received or collected by the treasurer upon assessments for improvements of streets, highways or alleys, shall be kept as a separate fund and in no wise used for any other purpose whatever except for redemption of warrants drawn against such fund.”

It seems, under these provisions, that, so long as the relations constituted by them existed between the holder of the warrant and the city, the latter's duty was that of custodian of a trust fund; and, unless there was notice to plaintiff or knowledge by him of these changed relations, the bar of the statute ought not to attach. It appears the question presented here has been virtually determined heretofore, in *Potter v. New Whatcom*, 20 Wash. 589 (56

Pac. 394, 72 Am. St. Rep. 135). The statute of limitations was held not to run until notice or knowledge came to plaintiff. The city there was described as sustaining a trust relation. In *Bidwell v. Tacoma*, 26 Wash. 518 (67 Pac. 259), there was misappropriation by the city of the money from a redemption fund applicable to the payment of delinquent tax certificates, and it was adjudged that the statute of limitations did not commence to run until demand for its payment had been made, or knowledge on the part of the plaintiff of refusal of the city to pay the amount, acquired.

It is urged by counsel for the city that the decision in *Quaker City National Bank v. Tacoma*, 27 Wash. 259 (67 Pac. 710), is in conflict with the two cases just mentioned. This case was mandamus to enforce payment of a warrant from a special assessment fund. It appears there the city had, some time after the creation of the special assessment fund, created a deficiency fund to supplement the deficiency in the special assessment fund. It was decided that the warrant drawn on the special assessment fund was payable out of the supplemental deficiency fund, for the reason that it was within the power of the city to create such deficiency fund, and direct the payment of the warrant out of the last fund. It was observed, however, in the course of the discussion, that, if the action were treated as an ordinary action for damages, it was barred by the statute of limitations.

We conclude in the case at bar, in accordance with the expressions heretofore made, that the relations between the parties under the general law and the charter created the trust described, and that, until plaintiff had knowledge or notice of the refusal of the defendant to carry out said ob-

Jan. 1903.]Syllabus.

ligation so imposed, the statute of limitations did not commence to run.

Affirmed.

DUNBAR, MOUNT and ANDERS, JJ., concur.

FULLETON, J., dissents.

[No. 4865. Decided January 10, 1903.]

30 665
35 209
30 665
42 465

JOHN R. GRAY *et ux.*, Respondents, v. WASHINGTON WATER POWER COMPANY, Appellant.

STREET RAILROADS — NEGLIGENT CONSTRUCTION OF TRACKS — PERSONAL INJURIES — INSTRUCTIONS.

In an action against a street railway company to recover for injuries resulting from plaintiff's buggy upsetting by reason of the wheels striking against the rails of the company's track, which had not been planked flush with the street as required by ordinance, an instruction that the company would be liable because of such failure to comply with the ordinance was not misleading because it added, "unless you should further find from the evidence that some sufficiently efficacious method be applied to keep the streets in safe condition for public travel"; there being evidence that the street had been rendered equally safe by substituting gravel for planks.

SAME.

An instruction that if the jury believe that the failure of defendant to plank its rails, as required by ordinance, at the point where plaintiff was injured constituted an obstruction to public travel, and plaintiff was injured by being thrown from her buggy because of such dangerous condition of the track, defendant was liable, was not erroneous as charging the absolute liability of defendant for failure to plank its rails so as to make them flush with the street, especially where the court further charged that if the jury found that if defendant protected its rails by some other method than planking, so as not to endanger the traveling public, the jury need not consider the requirements of the ordinance in determining the question of defendant's negligence.

Opinion of the Court.—DUNBAR, J.

[30 Wash.]

INSTRUCTIONS — TO BE CONSIDERED AS A WHOLE.

Detached portions of an instruction will not be considered by an appellate court; but all the instructions on the same subject must be construed together, in order to arrive at the intention of the court and the probable understanding of the jury.

SAME — CONFLICT.

An instruction that it was the duty of defendant to construct and maintain its tracks in the street in such a way as to be safe for travel by means of any vehicle drawn by the ordinary horse neither implies a requirement of absolute safety, nor is it contradicted by a later instruction that charges the jury that defendant is required to construct and maintain its road in such condition only as is reasonably safe for ordinary and reasonable use.

APPEAL — HARMLESS ERROR.

An appellate court will not be justified in reversing a judgment where an error has been committed, if the record, as a whole, overcomes the presumption of prejudice which is established by the commission of error, and shows affirmatively that no substantial rights of the appellant have been injuriously affected.

DAMAGES — COMPENSATION FOR PERSONAL DISFIGUREMENT.

In an action for personal injuries resulting from the negligence of another, the injured party is entitled to compensation for mental suffering and distress of mind on account of personal disfigurement.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Stephens & Bunn and *W. F. Townsend*, for appellant.

W. H. Plummer and *Thayer & Belt*, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—Respondent Carrie Gray was driving in a one-horse buggy on the streets of Spokane. Her horse became frightened and ran away, and it is alleged that when the buggy struck the rails of appellant's street car line, which was maintained on the street, the respondent was thrown from the buggy and was injured, and that the

Jan. 1903.] Opinion of the Court.—DUNBAR, J.

injury was caused by the negligence of the appellant in not maintaining its rails flush with the streets, in accordance with an ordinance of the city. A more extended statement of this cause may be found in 27 Wash. 713 (68 Pac. 360). Upon the trial of the cause a verdict was rendered in favor of the plaintiff, and upon motion for a new trial the same was granted on the ground that the running away of the horse and the loss of control of the horse were the proximate cause of the accident and injury complained of. This question came to this court on appeal and it was decided, in *Gray v. Washington Water Power Co.*, 27 Wash. 713 (68 Pac. 360), that the loss of control of a runaway horse would not prevent a recovery, notwithstanding the defective condition of the street. The rule was announced that, where two causes combine to produce an injury to a traveler on a highway, both of which are in their nature proximate, the one being a culpable defect in the highway and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect. This rule was applied to the appellant company, which was operating its cars under a grant of power from the city imposing the duty upon it to keep its rails flush with the street, and the judgment for a new trial was reversed, and the cause remanded, with instructions to deny the motion. Judgment was then entered in favor of respondents for the amount of damages found by the jury, from which judgment this appeal is prosecuted.

It is assigned that the court erred in giving instructions numbered 5, 6, 9, 16, and 17, and in refusing to give instruction No. 6 asked by appellant, and in giving it in a modified form. In answer to the alleged error in the refusal of the court to grant a new trial on the ground of in-

Opinion of the Court.—DUNBAR, J.

[30 Wash.

sufficiency of the evidence to sustain a verdict, and because the verdict is against the law, if these questions were not decided in opposition to appellant's contention on the former appeal, it may now be stated that on every material fact put in issue by the pleadings there was such a conflict of testimony as rendered necessary their submission to the jury; and, conceding the correctness of the law announced by this court on the former appeal, and which has become the law of the case, we can see no reason for interfering with the verdict of the jury, if the cause was submitted upon proper instructions.

The first instruction assailed by the appellant is No. 5, which is as follows:

"The ordinance which has been referred to in the complaint, and which has been admitted in evidence, contains certain requirements and regulations as to the manner in which the defendant's tracks shall be kept and maintained by it. These requirements are valid regulations imposed by the city of Spokane, and are imposed upon the defendant for the purpose of compelling the streets and highways to be kept in a safe condition for public travel, so far as the defendant's tracks are concerned; and if any person is, without negligence on his or her part, injured on account of the negligent failure of the defendant company to comply with the terms of said ordinance in respect to the condition of its track, then such person is entitled to recover from the defendant the damage so sustained, unless you should further find from the evidence that some sufficiently efficacious method be applied to keep the streets in safe condition for public travel."

The latter part of the instruction is criticized as being meaningless and liable to misconstruction, but we think the portion of the instruction objected to is, and would so be understood to be, a modification in appellant's interest. The jury doubtless understood the court to mean that, notwithstanding the failure of defendant company to comply

Jan. 1903.] Opinion of the Court.—DUNBAR, J.

with the terms of the ordinance, it would not be liable if any efficacious method other than the one prescribed by the ordinance had been adopted, and that the language was used with reference to the contention of the appellant that it rendered the street equally safe by substituting gravel for planks,—the ordinance prescribing planks. We will notice the objection to the use of the words “safe condition” in the discussion of a subsequent assignment.

Instruction No. 6 is as follows:

“The plaintiffs claim that the defendant negligently failed to comply with the terms of the ordinance which had been received in evidence in the following particulars: They claim that on May 2, 1901, at a point on Broadway which has been referred to by the witnesses, one or more of the defendant’s street car rails were in such a condition that the tops of the rails were not flush with the surface of the street, but projected above the same sufficiently high to cause an obstruction to public travel, and also claimed that there were no planks laid along the rails at said point in the manner mentioned in the ordinance or at all, and they claim that the alleged absence of planks, and the alleged projection of the rails above the surface of the street, was caused by the negligent failure of the defendant to maintain its track and roadbed as required by said ordinance. And I instruct you that if you believe from the evidence that said track was on May 2, 1901, in the condition claimed by the plaintiffs, and believe that such condition constituted an obstruction of public travel, and also believe that it was by reason of said alleged dangerous condition of the track that the plaintiff Carrie Gray was, without negligence on her part, thrown from her carriage as claimed by her, and received the injuries complained of, then I instruct you that the plaintiffs are entitled to recover damages from the defendant.”

It is contended that by the terms and tenor of this instruction the jury was authorized to render a verdict for respondents, as against appellant, if, without fault on the

part of Mrs. Gray, she sustained injuries on appellant's tracks at a point where they were not planked in accordance with the literal wording of the ordinance. But the court could not have been understood to have meant to have subjected the defendant to an absolute liability in the case of a failure to use planks as required by the ordinance, for the condition was prescribed that the jury must find, in addition to the failure to use the plank, that the condition wrought by such failure constituted an obstruction to travel. If there were any doubt about the meaning of the court, which we think there is not, it is made clear by instruction 17, which is as follows:

“If you should find from the evidence that although the defendant did not put planks along the sides of its rails as required by said ordinance, yet if you should find from the evidence that the defendant did by some other method protect its rails so that they would not endanger the traveling public, as hereinbefore stated, then you will not consider said ordinance in determining whether or not defendant was negligent in the respect mentioned.”

These two instructions, considered together, cannot possibly bear the construction placed upon them by counsel for appellant. Instruction No. 16, the giving of which is assigned as error, is as follows:

“It was the duty of the defendant to construct and maintain its tracks in the street in such a way as to be safe for travel thereon by means of a buggy or other vehicle drawn by the ordinary horse, having the ordinary disposition, allowing for the ordinary incidents of caprice or fright and driven by an ordinarily careful and prudent person.”

This instruction involves in some degree the same objection that is urged to instruction No. 5, and it is insisted that it employs the standard of perfection, and charges the appellant with the impossible task of constructing and maintaining its tracks in such a manner as to render the

Jan. 1903.] Opinion of the Court.—DUNBAR, J.

streets absolutely safe for the purpose of travel in vehicles drawn by ordinary horses. If this were true, the instruction would doubtless contain reversible error, for a reasonably safe place, or a street reasonably safe for travel, is unquestionably the requirement of both reason and authority. But we do not think this instruction imposes such a duty. The essence of it was that the street must be kept safe for ordinary use under ordinary circumstances, and we do not think it can be construed as imposing the duty of absolute safety. Such language is not employed, and counsel for appellant, in his brief, finds it necessary to employ language that is not used in the instruction, and imputes to the instruction the same meaning it would have if the language he used in his criticism were used in the instruction, viz., "to render the streets absolutely safe." If the court had used the words "absolutely safe," there would have been no doubt as to what was meant. But we find from a review of the authorities that the words "safe" and "care" and "safe place" are frequently used interchangeably with "reasonably safe," "reasonably safe place" and "reasonable care." "Safe" and "unsafe" are words frequently used in comparison by courts in discussing the question of a reasonably safe place, and evidently without any intention of changing the well-established rule of reasonable care or a reasonably safe place. But in any event, detached portions of an instruction cannot be considered by an appellate court; all the instructions on the same subject must be construed together, to arrive at the intention of the court and the probable understanding of the jury. Instruction 5, asked for by defendant, and, as modified by the court, given, was as follows:

"You are instructed that the defendant is not required or compelled to construct a street railway track or tracks at the point or place of the accident, or at any other point

or place, so as to provide for or against run-away horses, rigs or teams; that is, it is required to construct and maintain its road in such condition only as is reasonably safe for ordinarily reasonable and prudent persons using the streets at the ordinary and usual rate of speed, and driving a reasonably safe and gentle horse, allowing for the disposition of an ordinarily safe horse, and the ordinary incidents of caprice or fright, driven by an ordinarily careful and prudent person."

So that it would seem that the reasonable degree of safety imposed by the law was given to the jury in plain and unequivocal terms, and, conceding the contention of counsel for appellant that contradictory instructions raise a *prima facie* presumption of prejudicial error, we do not think the principle is applicable to the conditions under discussion. Doubtless the reason for the presumption is that the jury is confused rather than enlightened, and is as liable to follow the wrong instruction as the right one. But these instructions do not seem to be contradictory. On the contrary, the last instruction, instead of contradicting the first, made plain, definite, and certain that which was before indefinite. If modified instruction No. 5 had immediately followed and been a part of instruction No. 16, the latter part of the instruction would certainly have been understood as amplifying and making more definite the first part. It performed that office none the less effectively because it was given in a subsequent instruction. In addition to this, even if the instruction had been technically erroneous, under the circumstances of this case, and the special findings of the jury, the error would have been harmless, conceding the rule that, when error is committed, it will be held to be prejudicial unless it affirmatively appears to the contrary.

The really practical contest in this case was the alleged

Jan. 1903.] Opinion of the Court.—DUNBAR, J.

contributory negligence of Mrs. Gray, and the alleged negligence of the company in maintaining its rails above the surface of the streets. The jury was instructed that the plaintiffs could not recover unless it found that the rails of the track, at the time and place of the accident, were above the surface of the ground; that there was no contributory negligence on the part of Mrs. Gray; and that the raised condition of the street was the proximate cause of the injury. The jury found, in answer to a special interrogatory, that the track was raised above the surface of the street, and found for the plaintiffs under the further instruction that they could not find for the plaintiffs unless they found that Mrs. Gray was thrown out by the buggy striking the car rail at such place, and without contributory negligence on her part. So that, under the ruling of this court on the former appeal, no other verdict could have consistently been returned by the jury. An appellate court will not be justified in reversing a judgment where an error has been committed if it further appears from the whole record that such error is immaterial, or, in other words, if the record, as a whole, overcomes the presumption of prejudice which is established by the commission of error, and shows affirmatively that no substantial rights of the appellant have been injuriously affected. In this case, in addition to what we have said in relation to the two main issues controverted, the jury, having found that the track was raised in violation of the law, and that the accident was caused by the buggy striking the rails without fault on the part of Mrs. Gray, must have concluded that the track was not maintained in a reasonably safe condition.

The objection urged to instruction No. 9 is that it indorsed the doctrine of compensation for mental suffering

and distress of mind for disfigurement. On this subject the authorities are somewhat divided, though the decided weight of authority, we think, is to the effect that compensation can be recovered for such damages. We also think that such decisions are sustained by the better reasoning. Some of the cases cited by appellant, while permitting compensation for mental suffering induced by physical pain, distinguish such mental suffering from suffering arising from causes other than physical pain, viz., such suffering as arises from the contemplation of a maimed body or deformed face; and the reason assigned is that this element of damage is too vague and indefinite to be susceptible of proof. But we think this discrimination cannot be maintained in sound reasoning, and that mental suffering which is induced by the relations of mind and body is as difficult to measure as mental suffering induced by mortification and disfigurement. Not all people suffer equally from the same bodily injury. The finer and more delicate the physical organization, the more acute will be both the physical and mental suffering. In practice, mental suffering is always an element considered by juries in slander and libel cases, in actions for false imprisonment and breach of promise, and many other cases of like character, and ought to be. The wound to one's sensibilities is none the less painful when one's character is slandered. The law ought not to grant redress alone to the business man who sustains commercial damage, and refuse redress to others who have sustained a more poignant infliction. And he who negligently causes an injury to another who is faultless, which makes the latter an object of pity and abhorrence to his fellow men, and an object of ridicule to the thoughtless and unfeeling, and deprives him of the comfort and companionship of his fellows, ought to respond in damages for

Jan. 1903.] Opinion of the Court.—DUNBAR, J.

the injury sustained. It is true that there is no gauge furnished by the law for measuring such damages, and that it is, to a great extent, sentimental. But there is an element of sentiment in all damages,—even in the possession and use of money itself,—for a given amount of money may be of far more value to one person than to another. While all these considerations tend to prevent the assessment of damages in any case from being absolutely adequate or measured with exactness and understanding, they will not prevent the approximate measurement, and must be submitted to the best judgment of the jury. We are unable to see anything in the further contention that under this instruction the jury was authorized to bring in a verdict for double damages.

Objection was made to instruction No. 17 and modified instruction No. 5, but is not discussed in appellant's brief. They seem to us, however, to correctly state the law applicable to the case.

We think the instructions, as a whole, were fair, and favorable to appellant; and the jury, under such instructions, having found the issuable facts against the appellant, no matter what the opinion of this court might be on those questions of fact, we do not feel justified in disturbing the verdict.

The judgment will therefore be affirmed.

REAVIS, C. J., and MOUNT, FULLERTON and ANDERS, JJ., concur.

[No. 4386. Decided January 10, 1903.]

THE STATE OF WASHINGTON *on the Relation of George G. Bauer, Respondent, v. SUNSET TELEPHONE AND TELEGRAPH COMPANY, Appellant.*

APPEAL — CESSATION OF CONTROVERSY — RIGHT OF RESPONDENT TO DISMISSAL.

Where a subscriber for a telephone obtained a peremptory writ of mandate compelling the telephone company to publish a directory containing his name within a given time, prior to its regular date of publication, from which order the company, instead of complying, took an appeal and filed a supersedeas bond, but, pending the appeal, printed a directory containing respondent's name in the regular course of its business, shortly after the date fixed in the writ of mandate, the respondent is not entitled to a dismissal of the appeal on the ground of a cessation of the controversy, since the act of the appellant was not done in compliance with the order, but in accordance with its regular custom of periodically publishing such a directory.

MANDAMUS — UNNECESSARY ISSUANCE.

Under the rule that the extraordinary writ of mandamus will never issue in any case where it is unnecessary, it was error for the court to issue such writ compelling defendant to publish on or about April 15th a directory of subscribers to its telephone system, where the defendant had answered that it was then engaged in compiling and publishing such a directory in the regular course of its business, which it would have ready for distribution early in the month of April.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Reversed.

R. F. Lewis and George E. Wright, for appellant.

Benson & Aust, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This action was commenced in the lower court for the purpose of obtaining a writ of mandate re-

Jan. 1903.] Opinion of the Court.—MOUNT, J.

quiring the appellant to issue and distribute among its patrons a telephone directory containing the names of its new subscribers, and particularly the name of the relator. The affidavit filed is substantially as follows: That the relator for many months past has been engaged in the manufacture and sale of cigars at wholesale, and has a place of business in the city of Seattle; that the appellant has, owns, maintains, and operates in the city of Seattle the only telephone system in said city, and holds, operates, and maintains the same under franchise from the said city; that appellant is a corporation organized under the laws of the state of California; that on the 15th day of January, 1902, the appellant, at the request of the relator, placed in relator's place of business a telephone, which telephone is numbered Black 4,962, and is on the ten-party line system; that relator paid to the appellant the customary rent therefor, and has ever since so continued to pay; that appellant, at the time of the installation of said telephone, failed, and has ever since failed, to insert relator's name in its list, or in any list, of its subscribers, though often requested by relator so to do; that, owing to the growth of the city of Seattle, the constant moving of the inhabitants, and the extension of business, there is a constant and rapid change in respective numbers of the telephones used; that the population of the city of Seattle is rapidly growing, and that the telephone system of the appellant is being, and has been for many months, rapidly extended, and the number of new telephones being installed is constantly increasing; that for several months last past the said installation of new telephones has progressed in excess of twenty-five telephones per week; that the patrons of relator depend largely upon telephones in ordering goods; that the inhabitants of the city generally

transact a large portion of their business through telephones, and it is of the highest importance to the relator and the inhabitants of the city generally that a complete and revised list of all the subscribers to the appellant's telephone system, together with the respective numbers of such subscribers' telephones, be published at least once a month; that the appellant maintains no system in any wise adequate to convey to the public or telephone users the fact that any person is a new subscriber, and, owing to the system maintained by the appellant, it is almost impossible to ascertain who are the new subscribers, or whether or not a given person has a telephone, unless his name be included with the old list published and distributed by the appellant; that the appellant for many years has been, and still is, in the habit of compelling its subscribers and the public generally, to await its own pleasure in the publication and distribution of its lists of telephone subscribers, and it has at all times and still refuses to prepare or distribute such a list oftener than every four or five months; that the last list printed and distributed by the appellant was in October, 1901; that the relator has repeatedly demanded of the appellant that the said appellant include relator's name in a list or supplement of telephone users and distribute such list or supplement to the telephone users throughout the city generally; that the refusal of the appellant to publish and distribute relator's name to the telephone users throughout the city as being a subscriber of the appellant's system is of great damage to the relator; that the amount of said damage is incapable of ascertainment, and relator has no adequate remedy at law except by mandamus; that three days is ample time for the publishing and distributing by the appellant of the complete list, by supplement or otherwise, of all the sub-

Jan. 1903.] Opinion of the Court.—MOUNT, J.

scribers of the appellant in the city ; that on, to-wit, the 6th day of March, 1902, relator, in writing, demanded of the appellant, and had served upon the appellant's general manager in the city of Seattle, a written demand that within three days from said date appellant include the name of the relator in the regular list of telephone users supplied to such users, and that appellant distribute such list with the name of the relator therein within said time, a copy of which demand is set out in the affidavit ; that appellant has wholly failed and neglected to take any action whatever regarding the insertion of relator's name, and relator is still without remedy, except by mandamus ; that appellant has stated to relator that it was impossible for it to say when it would have a revised list, but that the same would not be published or distributed until after the first of April, 1902. Upon the filing of this affidavit the court issued a temporary writ. On the return day of this writ the appellant appeared, and filed a demurrer to the affidavit and a motion to quash the writ. This motion and demurrer was overruled, and appellant thereupon filed an answer, the substance of which is as follows : It denies that the relator will suffer irreparable injury or damage, and that the relator has no remedy at law, and that appellant fails to maintain a system adequate to convey to the public or telephone users the fact that a person is a new subscriber ; alleges, on the contrary, that it now does, and for many years past has, through the department known as "Main 600," maintained a ready and convenient means of conveying to all telephone users complete information regarding new subscribers, and the telephone numbers of same, and denies that it compels its subscribers or the public generally to await its pleasure for the publication or distribution of the lists of telephone subscribers ; alleges,

on the contrary, that it pursues a uniform, fixed, and reasonable course in publishing and distributing to all of its subscribers the printed telephone directories at intervals of four to six months, containing the names and addresses and numbers of the telephone subscribers, and at all times has maintained the same information on file in said department Main 600, readily and immediately accessible to all inquirers; denies that it is possible to print and distribute the said telephone directories within a period of three days; on the contrary, alleges that to compile, print, and distribute the same takes a very long period of time, to-wit, several weeks. For further and affirmative answer the appellant alleges that it is a corporation authorized to do business in the city of Seattle, and maintains and operates a system of telephones in said city and elsewhere; that in the operation of its telephone system in the city of Seattle is now has approximately 7,500 telephones installed and in use in said city; that it has for many years last past been a rule and regulation of the appellant and its invariable practice, whenever a telephone was subscribed for and installed, to print the name of the subscriber for the said instrument, together with a brief statement of his occupation and place of business, in a printed telephone directory, which said directory has been regularly printed and distributed to its subscribers and patrons as often as twice each year, and not oftener than once in four months; that said directory is printed for the use and convenience of the appellant company as well as for its subscribers; that the last directory was compiled during the month of October, 1901, and distributed by the appellant during the month of November, 1901, and contained approximately 6,500 names of subscribers; that the next telephone directory to be printed by respondent will contain even more

STATE EX REL. BAUER v. SUNSET TEL. & TEL. CO. 681

Jan. 1903.] Opinion of the Court.—MOUNT, J.

names and printed matter ; that the expense of printing and distributing the said telephone directory is very large, and will amount, in the case of the directory to be issued, to the sum of approximately \$1,500. It further alleged that for a long time it has constantly maintained, in its central office in the city of Seattle, a department charged with the duty of giving at all times and immediately upon request the number of the telephone in use by any subscriber, which for any reason could not be found in the printed telephone directory ; that this department is known as "Main 600;" that the uses and purposes of this department are fully described in all the telephone directories issued by the appellant ; that at the time the telephone subscribed for by the relator was installed the appellant notified the relator that his name would be printed in the next telephone directory, that the said directory would not be issued for a period of several months, and that the relator's name would not be printed until such directory should be printed in the regular course of business of the appellant ; that relator then and there acquiesced in and agreed to the same ; that the appellant then and there immediately upon the installation of said telephone gave to the said department "Main 600" the relator's name, address, occupation, and telephone number in the usual way ; that the same have ever since been, and now are, on file in the said department, and readily and immediately accessible to any person upon inquiry in the usual manner. Appellant further alleges that it has for some time been engaged in the compilation, for the purpose of printing, of a new telephone directory, and that the same will be printed and distributed as soon as it is possible for appellant so to do, to-wit, early in the month of April, 1902 ; all of which relator herein well knew before instituting this action. Ap-

pellant further alleges that the rules, regulations, and customs adopted in the conduct of its business are necessary and reasonable, and that said business cannot be conducted, in any other manner, and in particular that the rule and custom of printing and distributing the printed telephone directories at regular intervals of four to six months is a reasonable and proper method of transacting its said telephone business; that it is impracticable for the appellant to issue the said directory more frequently, and impracticable for it to issue its directory now in course of preparation before the early part of April next; that relator had full notice of all the rules, regulations, and customs of the appellant at the time when he subscribed for his telephone, and then and there acquiesced therein. On the filing of the answer respondent replied thereto, denying generally the new matter set up in the answer. Thereupon the court, without hearing any proof of the facts pleaded, and upon the admission contained in the answer that the appellant was then engaged in preparing a new telephone directory, and that the same would be printed and distributed as soon as it was practicable for appellant so to do, to-wit, early in the month of April, 1902, ordered a peremptory writ to issue requiring appellant to publish and distribute such directory "on or about April 15, 1902." This order was made on April 2, 1902. Exceptions were taken to these rulings of the court, and on April 9th notice of appeal was served upon respondent, relator below. On the following day the court fixed a supersedeas bond on appeal. On the 12th of April the supersedeas and appeal bonds were filed, and thereby the appeal to this court perfected. Before the hearing of the cause on appeal in this court, and on the 17th day of October, 1902, appellant filed the affidavit of one C. S. Hall, from which it appears that "as

Jan. 1903.] Opinion of the Court.—MOUNT, J.

early as the 15th day of April, 1902, said Sunset Telephone and Telegraph Company distributed to its patrons throughout the city of Seattle, and especially to the relator in the above entitled cause (George G. Bauer) a complete and perfect telephone directory containing the names of all its subscribers in the city of Seattle and the name of the relator. Affiant further says that during the months of July and August, 1902, appellant prepared, published, and distributed to all of its patrons in the city of Seattle another and later complete and perfect telephone directory; that the relator, George G. Bauer, no longer has any interest in the publication of appellant's directory." Several affidavits are filed by respondent denying that the new telephone directories were published and distributed as early as April 15, 1902, and stating that the distribution of these directories did not commence until several days subsequent to April 15, 1902.

Respondent moves to dismiss this appeal upon the ground that all right which he had at the commencement of the action has ceased to exist. This motion is based upon the case of *State ex rel. Coiner v. Wickersham*, 16 Wash. 161 (47 Pac. 421). In that case the relator was seeking by writ of quo warranto to oust the respondent, Wickersham, from the office of city attorney. The respondent in the writ was successful in the court below, and the relator appealed. Pending the appeal it was conceded that the respondent was legally appointed to the office and confirmed by the city council. He was, therefore, legally in office. A decision on the merits would have been futile because a judgment of reversal could not have been executed. There was no longer any controversy between the parties. The same was true in *Hice v. Orr*, 16 Wash. 163 (47 Pac. 424). In *Campbell v. Hall*, 28 Wash. 626 (69 Pac. 12),

there was a voluntary compliance with the order. In these cases, and in the cases therein cited in support thereof, the decision was based upon a voluntary compliance with the order of the court or upon a voluntary settlement of the matters in controversy by the parties interested. These cases are clearly distinguishable on that ground from the case at bar. In this case it does not appear that there was any intention to comply with the order of the court (see *Seattle v. Liberman*, 9 Wash. 276 (37 Pac. 433), and *Fenton v. Morgan*, 16 Wash. 30 (47 Pac. 214), but, on the other hand, it clearly appears that there was no intention to comply with such order. The affidavit which takes the place of a complaint in this action is, and must be, based upon the fact that the appellant owed a legal duty to the respondent, which was being refused. This duty consisted in the insertion of respondent's name and the number of his telephone in a directory within a given time, viz., three days. The appellant, in substance, denied such duty, but admitted that it owed a duty to insert respondent's name and number in a directory which it was then publishing, and about to distribute in the regular course of its business, naming the time, approximately, when the directory would be published and distributed. The court entered a judgment requiring appellant to perform this duty at a given time. From this judgment the appeal was taken. Appellant gave a supersedeas bond, which had the effect to stay execution for costs, and also to stay any proceeding by the court against the appellant for failure to comply with the judgment. The duty which appellant admitted that it owed to relator was not performed at the time the judgment directed, but was performed soon after, in the regular and due course of its business, without reference to the order of the court. This cannot be held to be a

Jan. 1903.] Opinion of the Court.—MOUNT, J.

voluntary compliance with the order. To hold that the performance of a duty in the usual and regular course of business is a voluntary compliance with the order of the court, as in this case, is to deny the right of appeal on questions of this character, which right, if the lower court is correct, may be vital to the life of the appellant, because, if each new subscriber to a telephone may require a new directory, containing his name and number, to be issued and distributed immediately, at large expense to the company, the business of the company must be suspended pending the appeal, or the right of appeal waived by continuing to do business. For example, if a person should purchase a ticket of a common carrier between its stations at a time when no regular conveyance was at hand, and the court, upon complaint, should issue a writ against such carrier to compel the carriage of such person at a stated time, and the carrier should appeal from such order, but, before the appeal could be heard, its regular and usual conveyance came along, and such person was permitted to be carried to his destination, as was his undisputed right, it could hardly be held that the carrier thereby waived its right of appeal. Yet this is exactly the position of the maker of the motion in this case. It is true that the controversy, so far as the respondent is concerned, has ceased, because his name has admittedly been published in the directory and the directory distributed. The statute expressly provides that an appeal shall not stay proceedings on the judgment or order appealed from unless a supersedeas bond be given. A judgment may, therefore, be enforced pending appeal, and the appeal prosecuted, notwithstanding the amount of the judgment has been collected on execution. In such a case an appeal will not be dismissed because the judgment creditor has received his money, and therefore,

as to him, the controversy has ceased, because such proceedings are held to be involuntary. We think the same principle should apply in cases of the character of the one at bar, and that when the compliance with the order results in the usual and ordinary course of business, without any intent to comply with the order, it should not be held to be voluntary unless there is a clear intention that such compliance shall be in obedience to the order appealed from. It does not so appear in this case, and the motion is therefore denied.

The respondent has failed to file a brief upon the merits of the controversy, apparently relying upon the motion to dismiss. The court below was in error in ordering the writ upon the admission in the answer. Conceding that the court was authorized to enter an order upon the admission that the appellant was then preparing a directory such as demanded by respondent, and would distribute the same on or about April 1, 1902, it should have entered an order of dismissal, and not an order for the writ, because the extraordinary writ of mandamus will never issue in any case where it is unnecessary. *State ex rel. Dusinberre v. Hunter*, 4 Wash. 651 (30 Pac. 642); *Barnett v. Ashmore*, 5 Wash. 163 (31 Pac. 466); 19 Am. & Eng. Enc. Law (2d ed.), 756.

The cause, for this reason, must be reversed, and ordered dismissed in the lower court.

REAVIS, C. J., and ANDERS and FULLERTON, JJ., concur.

Jan. 1903.] Opinion of the Court.—FULLERTON, J.

[No. 4419. Decided January 10, 1903.]

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85	76
30	687
36	117

MARTIN OLSON *et ux.*, Respondents, v. CITY OF SEATTLE,
Appellant.

INJUNCTION — TRESPASS UPON LANDS — INTEREST OF PLAINTIFF.

One who has paid a substantial portion of the purchase price for real property held by him under contract of purchase has such an interest in the land as will entitle him to maintain injunction, where the public authorities seek to take the same for a public use without first making compensation therefor.

SAME — VARIANCE — AMENDMENT OF PLEADING ON APPEAL.

In an action to enjoin the appropriation of land for a public use, although the complaint alleged ownership in fee and the proof showed less than a fee simple title, the complaint will on appeal be treated as amended to correspond to the proofs, where no objection was raised to the variance on the trial.

SALE OF LAND ACCORDING TO SURVEY — VARIANCE IN PLAT — EFFECT.

Where there is a discrepancy between a survey and a plat of lands, the survey controls when it can be ascertained; and one who purchases with reference to the monuments and boundaries acquires title regardless of the lines shown by a recorded plat.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Affirmed.

Mitchell Gilliam and William Parmerlee, for appellant.

S. S. Langland, for respondents.

The opinion of the court was delivered by

FULLERTON, J.—In March, 1888, Harry White and his wife, Anna, being then the owners in fee of certain real property situated in King county, platted the same into lots, blocks, streets and alleys, and caused a plat thereof to be made out and duly recorded in the auditor's office of King county, under the name of the "Second Motor Line Addition to the City of Seattle." Prior to the filing

of the plat the land was regularly surveyed, and the several lots, blocks, streets and alleys into which it was divided were marked upon the ground by posts or stakes driven at the several corners thereof. Certain of these lots, among which were the lots in question in this action, as actually surveyed and marked on the ground, did not conform to the recorded plat; that is to say, the lots in question, as actually surveyed, extended thirty feet farther west than the recorded plat showed them to extend, taking up that much of a street appearing upon the plat under the name of "Fremont Avenue." No part of the lots as surveyed were ever opened to the public as a street, nor recognized by the persons making the plat as part of the street. The makers of the plat, on the contrary, maintained exclusive possession of the lots as surveyed and marked on the ground until they parted with such possession to their grantees, and such grantees and their successors in interest have maintained a similar possession ever since. At the time the land was platted, it was outside of the city limits of the city of Seattle, but in 1895 the city's boundaries were extended so as to include the property. In early part of the year 1902 the corporate authorities of the city ordered Fremont avenue to be graded and otherwise improved according to certain plans prepared by the city engineer. These plans were made on the assumption that the street was as it appeared upon the recorded plat, and the contemplated improvements required the opening of the street to the full width shown upon such plat. A contract for that purpose was let to the defendant George Cessna. The contractor entered upon the performance of the work and proceeded therewith until he reached the lots in question, and was proceeding to tear down the respondents' fence, and to enter upon so much of the lots as

Jan. 1903.] Opinion of the Court.—FULLETON, J.

the recorded plat showed to be in the street, when this action was instituted against him to enjoin him from so doing. The city of Seattle was made a party defendant to the action, under proper averments, and alone defended. The trial resulted in a finding that the respondents were the owners of the lots as actually surveyed, and marked upon the ground, and in a judgment enjoining the defendants from interfering therewith until condemnation proceedings were had, and the damages of the respondents ascertained and paid or tendered. The city appeals.

In their complaint the respondents alleged that they were the owners in fee of the property. Their proofs showed that at the commencement of the action they were in the exclusive possession of the property, holding under contracts of purchase on which they had paid substantially all of the purchase price; that prior to the trial the purchase price necessary to entitle them to deeds had been fully paid as to all of the property; that for two of the four lots in question the deed had actually been delivered, and for the other two there was simply a delay in its transmission. The appellant questions the right of the respondents to maintain an action of injunction upon this showing, contending: First,—that they have no such interest in the property as entitles them to maintain an action of injunction; and, second, that there is a fatal variance between their pleading and proofs. As to the first objection, we think there can be no question as to right of respondent to maintain the action. The right of possession alone of real property is a sufficient interest therein to enable a person having such right to invoke the remedies provided by law against a trespasser thereon; and one holding real property under contract of purchase with the owner, and who has paid a substantial portion of the purchase price,

has such an interest therein as will entitle him to compensation before the property can be taken or damaged for a public use. His right to compensation is not affected by the fact that his interest is less than the whole, so long as it is substantial, and the taking of the property affects that interest. That injunction is the proper remedy in a case where the public authorities seek to take private property for a public use without first making compensation therefor was determined in this court in *Brown v. Seattle*, 5 Wash. 35 (31 Pac. 313, 18 L. R. A. 161), and has been followed in practice ever since. See *State ex rel. Smith v. Superior Court*, 26 Wash. 278 (66 Pac. 385); *Seattle Transfer Co. v. Seattle*, 27 Wash. 520 (68 Pac. 90). There is nothing in the case of *Colby v. Spokane*, 12 Wash. 690 (42 Pac. 112), that is contrary to this principle. The court there was discussing the sufficiency of the evidence to establish ownership, and not the character of ownership necessary to maintain the action. As to the second objection, it may be that the respondents were not entitled to prove the interest shown under an allegation of ownership in fee, and that there was a variance between the pleadings and proof. It is not, however, fatal to their right of recovery. Had the question been raised and sustained in the court below, the respondents would have been entitled to amend so as to make their complaint correspond with their proofs, but the question was tried as if there was no variance. This court will therefore treat the complaint as amended, and determine the respondents' rights upon the facts proven.

The appellant assumes that, where there is a lack of uniformity between the survey as actually made upon the ground and the recorded plat of such survey, the plat, and not the actual survey, controls, and hence in this case that

Jan. 1908.] Opinion of the Court.—FULLERTON, J.

the respondents' title must depend upon adverse possession; and a large space in its brief is devoted to an argument tending to show that title to a street or alley dedicated to public use cannot be acquired by adverse possession. But the rule is not as the appellant assumes it to be. Where there is a discrepancy between the survey and the plat, the survey controls, when it can be ascertained, and the proof here is overwhelming that the boundaries of the lots as claimed by and in possession of the respondents are in exact accord with the original survey. The intention of one who has platted land into lots and blocks is indicated by the monuments which he has caused to be placed, marking the boundaries of the same, and another has a right to purchase from him with reference thereto, and such monuments and boundaries cannot be changed by showing that they do not conform to a plat on file. Lots in cities and towns are not held by such a precarious tenure. *Root v. Town of Cincinnati*, 87 Iowa, 203 (54 N. W. 206); *Racine v. J. I. Case Plow Co.*, 56 Wis. 539 (14 N. W. 599); *Holst v. Streitz*, 16 Neb. 249 (20 N. W. 307); *Burke v. McCowen*, 115 Cal. 481 (47 Pac. 367); *Fleischfresser v. Schmidt*, 41 Wis. 223.

This view of the case renders it unnecessary to discuss the question of adverse possession.

The judgment appealed from is affirmed.

REAVIS, C. J., and DUNBAR, ANDERS and MOUNT, JJ., concur.

30 602
33 603

[No. 4452. Decided January 12, 1903.]

THE STATE OF WASHINGTON, Respondent, v. E. W. ROLLER, Appellant.

RAPE — SUFFICIENCY OF EVIDENCE — CORROBORATION.

In a prosecution for rape committed by a father upon his daughter, the evidence was sufficient to sustain a conviction, although the only evidence of the commission of the act was that of the daughter, which was contradicted by that of the father, where the daughter's testimony was corroborated by the fact of her father's flight when charged with his improper relations, and by a letter from him to his son, after arrest, endeavoring to get the latter to have the daughter not testify against him, so that he might get out of the scrape.

SAME — EXTRADITION — EVIDENCE — HARMLESS ERROR.

Permitting the officer who received the custody of an extradited prisoner to testify for what crime he was extradited was harmless error, where all the proceedings in extradition, except the warrant therefor issued by the president of the United States, had been put in evidence, since, in the absence of a contrary showing, it would be presumed that the proceedings were regular, and that the warrant of extradition was in accordance with the other proceedings which were shown of record.

SAME — ELEMENTS OF CRIME WHEN CHILD UNDER AGE OF CONSENT.

Under Bal. Code, § 7062, which defines carnal intercourse with any female child under the age of eighteen years as rape, the act is a crime whether or not force is used, and the fact that the prosecuting witness testified in the trial that the defendant used force, while the information charged that defendant did "feloniously carnally know and abuse" the prosecutrix, would not support the objection that the defendant was extradited for one crime and tried for another.

SAME — TRIAL UPON DIFFERENT CRIME — ABATEMENT.

Where the crime for which defendant is placed on trial is not the one for which he was extradited, objection should be raised by plea in abatement, presenting a question of law for the court upon the record.

WITNESSES — CROSS-EXAMINATION.

Where a witness has already testified that he told a falsehood prior to trial to the attorney engaged in cross-examining him, it

Jan. 1903.] Opinion of the Court.—MOUNT, J.

was not error for the court to restrict further cross-examination along the same line, especially where the questions call for conclusions which the jury have a right to draw from the whole demeanor and testimony of the witness.

SAME.

In a prosecution for rape by a father upon his daughter, where defendant's son had shown that he had taken an active part in the prosecution, it was not error to sustain an objection to a question asking the son what he had ever furnished to carry on the defense.

SAME.

The rejection of testimony would not constitute error, where the witness had already gone over the matter, or was subsequently permitted to answer substantially the same question in another form.

RAPE—CORROBORATION OF PROSECUTING WITNESS.

In the absence of statute requiring it, it is not necessary that the prosecuting witness be corroborated upon a prosecution for rape.

Appeal from Superior Court, Skagit County.—Hon. GEORGE A. JOINER, Judge. Affirmed.

Henry McLean, for appellant.

M. P. Hurd, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

MOUNT, J.—Appellant was tried and convicted for the crime of rape, committed upon his own fifteen year old daughter. From a judgment of conviction and sentence, he appeals, alleging (1) that the evidence is not sufficient to sustain a conviction, (2) errors in the admission and rejection of certain evidence, and (3) errors in instructions given and refused. The evidence in brief was substantially as follows: The appellant and his family, consisting of a wife, two daughters, and a son, had lived in Skagit county on a farm for about fifteen years. Lulu Roller, the youngest child, was, at the time of the trial in February,

1902, sixteen years of age. She testified that her father, on June 25, 1899, when she was about fourteen years of age, and frequently thereafter, forcibly compelled her to have sexual intercourse with him. The wife of the appellant at that time was an invalid. On May 3, 1901, she died, after an illness extending over a period of about two years. Lulu Roller, during her mother's life time, did not tell any one of the relations existing between herself and her father. On the 19th of May, sixteen days after her mother's death, she told her married sister, Mrs. Campbell, of the conduct of her father towards her. These acts and all improper relations were stoutly denied by appellant Mrs. Campbell, upon being told by Lulu of these relations, immediately told her husband, who in turn told Floyd Roller, appellant's son, who was then about twenty years of age. Floyd was not told the exact nature of the improper relations existing between his sister Lulu and his father, and he testified that at that time he did not know the exact nature of these relations; that on the next morning after this information had been received he armed himself with a revolver, and, in company with another boy about his own age, went to his father, who was then engaged in planting potatoes in the garden, and asked him what the trouble was between him and Lulu; that his father said there wasn't anything, and, if there was anything, she had been telling lies on him, and if she told anything on him he could tell something on her. Thereupon Floyd told his father that the officers were after him and that he had better leave the country. Thereafter the appellant secreted himself in the neighborhood, while the officers and others were searching for him, and, after a day or two, without seeing any of his children, left his home and went into British Columbia, where he was subsequently arrested and extradited. While

Jan. 1903.] Opinion of the Court.—MOUNT, J.

he was under arrest in British Columbia, he wrote his son Floyd as follows:

“ Vernon, B. C.
Dear Floyd :

They have me in jail. If it comes to court have Lulu to refuse to testify. She can if she wants to. She doesn't have to go against her own father. Please do and get me out of this scrape.

Yours as ever.”

While there are many things in the evidence which seem unnatural and unreasonable, and while the incident of flight may of itself be a very weak indication of guilt under the explanation of the appellant that he was afraid of violence because of the excitement in the neighborhood, yet, after a careful consideration of all the evidence, we are convinced that there was sufficient to go to the jury; and, if the prosecuting witness needed corroboration, sufficient was found, in the letter above referred to, in the conduct of the defendant when he was first informed of the charge his daughter had made against him, and his subsequent conduct, to warrant the jury in returning a verdict of guilty. Under the well-established rule, as laid down in *State v. Kroenert*, 13 Wash. 644 (43 Pac. 876), *State v. Murphy*, 15 Wash. 98 (45 Pac. 729), and many subsequent cases, this court will not disturb the verdict of the jury.

It is complained as error that the lower court permitted the officer of Skagit county in this state, who received the custody of appellant from the British Columbia authorities, to state for what crime the appellant was extradited. No doubt the warrant itself was the best evidence of this fact. It clearly appears from the record that the arrest of the appellant in British Columbia was made under a warrant issued by the judge under the extradition act in British Columbia, which warrant was introduced in evi-

dence. In fact, the record containing all the proceedings in extradition, except the warrant of extradition issued by the president of the United States, was offered by the state and received in evidence. This record clearly shows that the appellant was arrested in British Columbia, charged with the same crime for which he was afterwards tried and convicted in this action; that the warrant of arrest issued by the authorities of British Columbia charged the appellant with the offense, viz., "the crime of rape committed within the jurisdiction of the state of Washington." If it was error to permit the witness to state what the warrant under which he received the body of the appellant contains, it was harmless error, because, in the absence of a contrary showing, it will be presumed that the proceedings were regular, and that the warrant of extradition was in accordance with the other proceedings which are shown of record. This record of the extradition proceedings was not permitted to go to the jury, but was passed upon by the court for the purpose of determining whether the appellant was extradited upon the same charge for which he was placed on trial. We think this was proper.

It was argued by counsel for the defense that the crime for which the defendant was extradited was not the one for which he was being tried, because the prosecuting witness testified that her father had carnally known her by force, while the information charged that the appellant "did unlawfully and feloniously carnally know and abuse one Lulu Roller, then and there being a female child under the age of sixteen years, to-wit, the age of fifteen years." The statute, § 7062, Bal. Code, defines rape as follows:

"A person shall be deemed guilty of rape who,—(1) Shall, by force and against her will, ravish and carnally know any female of the age of eighteen years or more; (2) Shall, by deceit, deception, imposition or fraud, in-

Jan. 1903.] Opinion of the Court.—MOUNT, J.

duce a female to submit to sexual intercourse; (3) Shall carnally know any female child under the age of eighteen years."

When it was alleged and proved that the prosecutrix was under the age of eighteen years, it was not necessary to prove force. Force is conclusively presumed, and the proof of force in such a case does not take away or add to the elements constituting the offense. The fact that the prosecuting witness testified that the appellant used force does not change the character of the crime under the statute; it was still the same crime alleged in the information and alleged in the record of extradition. If the crime for which the appellant was placed on trial was not the crime for which he was extradited, this was proper to be raised by the defendant in the nature of a plea in abatement and must be shown by the record. It was a question of law for the court upon the record, with which the jury had nothing to do.

While Floyd Roller, a witness for the prosecution, was on the stand, he was asked on cross-examination the following questions: "Do you mean to say you would tell a lie on that occasion in order to mislead me on this trial?" This question referred to a previous occasion, when the witness had talked with the attorney for the defendant concerning the case. His answer was, "I might have." "You are willing to swear to a lie now to mislead the jury, are you not?" To this question an objection was made, but no ground stated, and the court sustained the objection. Further on the witness was again asked with reference to the same matter: "You were perfectly willing at that time to tell a falsehood to me in that matter?" Answer: "Certainly I was." "I want to ask you if you consider that you are at liberty every time your interests are at

stake to tell a falsehood?" The same kind of an objection was sustained to this question. The court must have some discretion in examinations of this character, and we do not think the court abused his discretion in this matter. The witness had answered the question for all practical purposes, and the questions to which objections were sustained called for a conclusion which the jury had a right to draw from the whole demeanor and testimony of the witness. The ruling was therefore not error.

The same witness was asked this question: "What, if anything, have you ever been furnishing to carry on this defense?" The objection to this was properly sustained. The witness had shown that he had taken an active part in the prosecution. It was unnecessary to show that he had contributed nothing to the defense. A similar question was also asked of the witness Mr. Postlewait, and was properly denied for the same reason. Mr. Postlewait was also asked: "Do you remember of hearing me ask Mr. Floyd Roller this question: If he claimed to own the flume, and then asked him by what right, and he replied that his father had forfeited his part, and that the whole thing belonged to him?" Objection was properly sustained to this question, because the witness had either before gone over the matter, or was subsequently permitted to answer substantially the same question in another form.

Counsel for appellant requested the court to instruct the jury as follows:

"The testimony of the prosecutrix alone is not sufficient upon which to base a conviction. It must be in some way corroborated. The wrong includes violence done to the prosecutrix, and if this could be shown by proof aside from her testimony, and such proof be not produced, the defendant should be acquitted."

Jan. 1903.] Opinion of the Court.—MOUNT, J.

This instruction was refused, and the court instead instructed the jury as follows:

"I instruct you further in cases of this kind, if you find from the evidence beyond all reasonable doubt, such as I will define to you, that the prosecutrix in this case, viz., Lulu Roller, was a female child under the age of eighteen years at the time mentioned in the information, and if you further believe beyond a reasonable doubt that the defendant had illicit sexual intercourse with such prosecutrix at the time mentioned in the information, and you further find that her credibility had in no manner been successfully impeached, and you believe her testimony and disbelieve the defendant, you will have a right to return a verdict of guilty against the defendant, even though there has been no corroborating testimony offered or given in this case in support of the testimony of the prosecutrix as to the particular acts constituting the offense of rape as heretofore defined. . . . You are instructed that a charge of the nature of that for which the defendant is on trial is particularly difficult for the state to prove or the defendant to clear himself of. No charge can be more easily made, and none is more difficult to prove or disprove. From the nature of the case, the complaining witness and the defendant are generally the only witnesses. You should be satisfied that a case is made out by the state as outlined in these instructions, beyond all reasonable doubt, before you find the defendant guilty, if you should find him guilty. And if you are not satisfied beyond a reasonable doubt, you should acquit the defendant."

In this state there is no statute requiring the prosecuting witness to be corroborated in cases of this character. The instructions given by the court clearly state the correct rule in this state. See McClain on Criminal Law, § 458, and authorities there cited.

A number of other instructions were requested by the defendant which were refused by the court. It is unnecessary to set these instructions out or discuss them in this

opinion. All that were not covered by instructions given were clearly improper, and the court correctly denied them. The instructions given were fair, clear, and concise. They fully stated all the rules of law applicable to the case, and counsel for appellant recognized this, because no exceptions were taken thereto other than the exception to the instruction above set out in relation to corroborating evidence.

There is no reversible error in the record, and the judgment is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS and DUNBAR, JJ., concur.

30	700
31	33
31	100
30	700
34	58
30	700
40	557

[No. 4535. Decided January 12, 1908.]

THE STATE OF WASHINGTON on the Relation of Marie Carrau v. SUPERIOR COURT OF KING COUNTY, W. R. Bell, Judge.

PROHIBITION, WRIT OF — REMEDY BY APPEAL.

There being a remedy by appeal from the judgment of the superior court in regard to the distribution of a decedent's estate, the court will not be restrained by writ of prohibition from proceeding in the matter, although it may be acting without jurisdiction.

SAME — ADEQUACY OF REMEDY.

The adequacy of the remedy by appeal is not affected by the expense thereof, nor by the delays and annoyances incident to an appeal.

Original Application for Prohibition.

Jesse P. Houser and J. W. Robinson, for relator.

Preston, Carr & Gilman and C. H. Farrell, for respondent.

Jan. 1903.]

Opinion Per Curiam.

PER CURIAM.—This is an application for a writ of prohibition to prohibit the superior court of the state of Washington for King county from proceeding to hear and determine the application of Hannah Callaghan, Edward Corcoran, and Samuel H. Piles in the distribution of the estate and surrender of the real estate of John Sullivan, deceased, to petitioners, as the persons entitled by law thereto. It is shown by the affidavit accompanying the petition for the alternative writ that a suit has been instituted in the circuit court of the United States for the district of Washington by said Hannah Callaghan *et al.* against the administrator of the estate of said John Sullivan, deceased, and Marie Carrau, who claimed to be the sole legatee and devisee of the entire estate of John Sullivan, under an alleged nuncupative will. From the decree rendered by the circuit court of the United States in that suit the said Marie Carrau had appealed to the United States circuit court of appeals, which appeal, it is claimed, is still pending, and has been superseded by a supersedeas bond executed on her behalf. It is not necessary to enter into a discussion of the merits of this case, for it is conceded that an appeal will lie from the action of the court, whatever judgment it may make in regard to the question of distribution of the estate, and the law provides for the superseding of such judgment. It was held by this court in *State ex rel. Townsend Gas, etc., Co. v. Superior Court*, 20 Wash. 502 (55 Pac. 933), that an application for the extraordinary writ of mandamus or prohibition would not be entertained by this court when it appeared that there was an adequate remedy by appeal, notwithstanding it might also appear that the court was acting without jurisdiction. That case has been followed by an unbroken line of authorities ever since, and it has also been determined that the expense of appeals and the delays and annoyances

incident to an appeal do not affect the adequacy of the appeal.

The petition for the writ will be denied.

30 702
40 557

[No. 3757. Decided January 15, 1908.]

THE STATE OF WASHINGTON *on the Relation of W. W. Zent v. C. H. Neal, Judge of the Superior Court of Adams County.*

PROHIBITION, WRIT OF — REMEDY BY APPEAL.

The writ of prohibition will not issue to restrain the superior court from entertaining an appeal from the order of a board of county commissioners establishing a county road, since there is an adequate remedy by appeal from the judgment of the superior court.

Original Application for Prohibition.

W. W. Zent, for relator.

Happy & Hindman, for respondent.

PER CURIAM.—This is an application for a writ of prohibition to prohibit the superior court of Adams county from entertaining an appeal from the order of the board of county commissioners of said Adams county establishing a county road. A motion is interposed to dismiss the petition, for the reason that there is an adequate remedy by appeal. The motion seems to be well taken, and the application is therefore dismissed.

Dec. 1902.]Opinion Per Curiam.

[No. 4288. Decided December 12, 1902.]

ADAMS COUNTY, Respondent, v. ALBERT SCHROEDER, et ux., Appellants.

Appeal from Superior Court, Adams County.—HON. FRANK H. RUDKIN, Judge. Affirmed.

W. W. Zent and Sullivan, Nuzum & Nuzum, for appellants.

C. L. Holcomb and O. R. Holcomb, for respondent.

PER CURIAM.—This case involves the same questions which were decided by this court in *Selde v. Lincoln County*, 25 Wash. 198 (65 Pac. 192). Under the rule announced in that case, the judgment will be affirmed.

[No. 4428. Decided December 31, 1902.]

MARTIN L. BERGMAN et al., Appellants, v. CHARLES P. OUDIN et al., Appellants.

30	703
Case 2	
31	482
31	484

Appeal from Superior Court, Spokane County.—HON. GEORGE A. JOINER, Judge. Affirmed.

R. L. Edmiston and Danson & Hunke, for plaintiffs.

W. J. Thayer, for defendants.

PER CURIAM.—This case involves only questions of fact. Both parties have appealed from the findings of fact and conclusions of law made by the court. After an examination of the lengthy record presented and the extensive briefs of counsel, we have concluded that substantial justice was meted out to the parties by the trial court, and are not inclined to interfere with its judgment. The judgment will, therefore, be affirmed, neither party obtaining costs on appeal.

[No. 4463. Decided December 31, 1902.]

STATE OF WASHINGTON *on the Relation of F. P. Race et al., Respondents, v. REBECCA GRAHAM et al., Appellants.*

Appeal from Superior Court, Island County.—Hon. George C. Hatch, Judge. Reversed.

S. D. King, for appellants.

A. W. Buddress, for respondents.

PER CURIAM.—The motion to dismiss in this case will be overruled, and, for the reasons expressed in the opinion in *State ex rel. Race v. Cranney*, 30 Wash. 594, the judgment will be reversed, with orders to dismiss the petition.

INDEX.

ABATEMENT. See **CRIMINAL LAW**, 16.

ACCOMPLICE. See **BURGLARY**.

ACTION.

1. *Form of—Equitable Relief in Action for Damages.* Under Bal. Code, § 4793, which provides that there shall be in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action, it was error for the court to dismiss an action for damages for forcible and wrongful eviction from leased premises on the ground of the invalidity of the lease in law for lack of acknowledgment, when in fact the lease was enforceable in equity as a valid contract by reason of part performance thereunder.—*Browder v. Phinney*..... 74
2. *Joinder of Actions—Breach of Contract—Conversion.* It is not a misjoinder of causes of action to unite in one complaint an action for the recovery of damages for the breach of a contract, and an action which sets up the same contract and alleges that plaintiff, in order to fulfill it, erected certain buildings and camp equipment, and that defendant wrongfully took possession thereof and refused delivery on demand.—*McCorkle v. Mallory*. 632

See **INTERPLEADER; JURISDICTION; LIMITATION OF ACTIONS**, 3.

ADVERSE POSSESSION. See **EJECTMENT**, 1.

AFFIDAVIT. See **APPEAL**, 18, 19.

ALIENS. See **ATTORNEY AND CLIENT; JUDGMENT**, 1.

APPEAL.

1. *Statement of Facts—Matters Included.* The superior court cannot be compelled to certify a statement of facts covering that part of a case which occurred more than ninety days prior to the date of the filing of the statement, inasmuch as the utmost limit of time within which a statement can be filed is ninety days after the time begins to run within which an appeal may be taken.—*State ex rel. Dutch Miller Mining & Smelting Co. v. Superior Court of Kittitas County*..... 43
2. *Review of Prior Orders.* Although under Bal. Code, § 6500, subd. 7, all prior orders made in a cause are reviewable upon appeal from a final order made after judgment, the review is restricted to such prior orders as were made in the course of the particular proceeding leading up to the final order appealed from, and would not include other orders made in different proceedings in the same action; hence an order denying a motion to vacate a judgment would not be reviewable upon an appeal from a subsequent order denying a like motion for vacation and asking for a rehearing of the original motion.—*Id*..... 43
3. *Briefs—Assignment of Errors.* Although appellant may not have specifically assigned the errors relied on for reversal in his brief, as required by statute and rule of court, the court will not strike the brief and affirm the judgment, when it has been able to discover therefrom the errors relied on.—*Crowley v. McDonough*..... 57
4. *Statement of Facts—Filing—Extension of Time.* Under Bal. Code, § 5062, which provides that a proposed statement of facts must be filed and served within thirty days after appeal may be taken from a final order, which time may be enlarged either before or after its expiration, but not for more than sixty days additional, an application for an extension of time within which to file a statement of facts must not only be filed, but acted upon by the court, within the sixty days next following the thirty days after the right to appeal accrues.—*Id*..... 57
5. *Same—Power of Court to Order Nunc Pro Tunc.* The superior court has no power, after the expiration of the time limited by statute for the filing of a statement of facts, to order the filing of such statement as of a previ-

APPEAL—CONTINUED.

- ous date, where the application for further time was not considered by the court during the time prescribed by law for such filing.—*Id.* 57
6. *Same—Motion After Expiration of Ninety Days a Nullity.* After the expiration of the original thirty days provided by statute, a statement of facts can be filed only by permission of the court, and hence the filing of a statement thereof, but within the sixty days additional permitted by statute, without leave or order of court, would not create or preserve any rights in favor of appellants, or entitle them to any of the benefits accruing from a timely filing of such statement.—*Id.* 57
7. *Findings of Court—Sufficiency of Evidence.* Where the testimony is conflicting and the preponderance is not clearly against the findings of the trial court, the supreme court will not interfere on appeal.—*Jordan v. Coulter.* 116
8. *Notice—Parties.* When a party to an action has not appeared except for the purpose of disclaiming any interest in the subject matter of the suit, he is not a necessary party to the suit, and need not be served with notice of appeal.—*First National Bank v. Gordon Hardware Co.* 127
9. *Same—Dismissal for Failure to Serve All Parties.* A motion to dismiss an appeal for want of service of notice upon one of the parties to the action is premature, where the appellant has not brought up his record on appeal and his time therefor has not expired, since the question of whether due notice of appeal has been given to all the parties entitled thereto can be determined only by an inspection of the record.—*Id.* 127
10. *Unconsidered Objections—Review on Subsequent Appeal.* Where the supreme court, in reversing an order of the lower court granting defendant a new trial which had been granted on an erroneous ground, refused to review other grounds upon which the lower court ruled against defendant, the defendant may, upon the entry of judgment denying its motion, appeal therefrom itself, and have a review of the grounds urged by it originally, which had not been sustained at the time its motion for:

APPEAL—CONTINUED.

- a new trial was under consideration by the lower court.—*Gray v. Washington Water Power Co.* 154
11. *Dismissal—Failure to File Transcript—Imposition of Terms.* Under Laws 1901, p. 29, § 2, which provides that the transcript on appeal shall be prepared, certified and filed in the office of the clerk, at or before the time when the appellant serves and files his opening brief, the failure of the appellant to have such transcript filed before serving and filing his brief will, on motion of respondent, subject him to the imposition of terms in order to entitle him to the further prosecution of his appeal.—*Prescott v. Puget Sound Bridge & Dredging Co.* 158
12. *Time of Filing Transcript.* An appeal will not be dismissed because of appellant's failure to file a transcript of the record at or before the time he served and filed his opening brief, where the motion to dismiss is not made until after the record is supplied.—*Johnson v. San Juan Fish & Packing Co.* 163
13. *Exceptions to Instructions—Timeliness.* Exceptions to the giving and the refusing of instructions will not be considered on appeal, where they were not taken until after verdict.—*Sterrett v. Northport Mining & Smelting Co.* 164
14. *Stay of Restraining Order—Supersedeas Bond.* Upon a showing of the superior court's refusal to fix the amount of a supersedeas bond staying the execution of a restraining order pending appeal, the supreme court, although denying the writ of certiorari in the cause, will direct the lower court to fix the amount of such bond.—*State ex rel. Norris Safe & Lock Co. v. Superior Court* 177
15. *Prejudicial Error.* Although there may be evidence sufficient to establish plaintiffs' title by adverse possession, which was the vital issue in the case, yet, where the evidence is conflicting, and the jury may have been influenced in their verdict for plaintiff by reason of the erroneous admission of testimony of transactions had with a decedent tending to establish plaintiffs' title, the error cannot be regarded as without prejudice.—*Kline v. Stein*. 189

APPEAL—CONTINUED.

16. *Supersedeas—Staying Temporary Injunction.* The writ of prohibition will not issue to restrain the superior court from fixing the amount of a bond to stay the execution of a temporary mandatory injunction pending appeal, where the injunction was issued upon a hearing by the court after notice given to all parties.—*State ex rel. Quandi v. Superior Court*..... 197
17. *When Lies—Judgment Against One of Several Defendants.* An order sustaining a demurrer to a complaint interposed by one of several defendants is appealable, although there has been no disposition of the case so far as another defendant is concerned, when the latter had never been served nor appeared in the action (*Keef v. Tibbals*, 18 Wash. 656, followed).—*Lough v. John Davis & Co.* 204
18. *Affidavits—Review.* On appeal from an order overruling a motion to vacate a judgment, affidavits in support thereof will not be considered, when not incorporated in the record by bill of exceptions or statement of facts.—*F. Chevalier & Co. v. Wilson*..... 227
19. *Same—Inclusion in Record by Direct Reference in Order of Court.* The fact that the order of the court in overruling a motion to vacate a judgment recites that the court has examined the affidavits and briefs furnished by the respective parties and duly considered the same, is not a sufficient identification of affidavits submitted for consideration on appeal, nor does it appear from such recital that the affidavits brought up were all the affidavits presented to the lower court and upon which it based its decision (*State v. Vance*, 29 Wash. 435, distinguished).—*Id.*..... 227
20. *Order Appointing Receiver—Supersedeas.* An appeal from an order appointing a receiver will not operate as a stay of proceedings under the receivership, when no supersedeas bond has been given for the purpose of superseding the receiver pending the appeal.—*State ex rel. Laughlin v. Superior Court*..... 233
21. *Bond—Judgment Debtor as Surety.* Under Laws 1893, p. 122, § 7, which provides that "the appeal bond must be executed in behalf of the appellant by one or more

APPEAL—CONTINUED.

- sureties," an appeal bond is insufficient when it has no other sureties thereon than parties against whom the judgment appealed from was entered.—*David v. Guich* 266
22. *Filing New Bond—Dismissal of Appeal.* Where the appeal bond executed by appellant was ineffective and the time for filing a bond had expired, his appeal will be dismissed without his being permitted to file a new and sufficient bond.—*Id.* 266
23. *Notice—Parties.* A defendant who disclaims any interest in the subject-matter of an action is not a necessary party to an appeal from the judgment therein, and therefore need not be served with notice of appeal.—*Smalley v. Laugenour*. 307
24. *Same—To Whom Addressed.* The statutory provision requiring notice of appeal to be served on all parties who have appeared in the action does not require that notice shall be directed to all parties who have appeared, but it is sufficient if the notice be directed to the prevailing parties.—*Id.* 307
25. *Same—Service by Attorney for Appellant Upon Himself as Attorney for Another Party.* The fact that attorneys for appellants are also attorneys for one of the other parties to the action would not debar their serving themselves with notice of appeal as attorneys for such client not appealing, when there is nothing in the record showing a conflict of interest between their clients.—*Id.* 307
26. *Prejudicial Error.* Where prejudicial errors of law occur upon a jury trial, it is the duty of the supreme court to reverse the case, though the court thinks it is decided correctly upon the facts in evidence.—*McNicol v. Colkins* 318
27. *Harmless Error—Striking Allegations of Reply.* The striking out of affirmative matter in the reply cannot be urged as error, when there was no testimony on the subject of the stricken matter.—*Anderson v. Harper*. 378

APPEAL—CONTINUED.

28. *Insufficiency of Exceptions to Findings—Affirmance of Judgment.* The insufficiency of appellant's exceptions to findings of fact would not entitle respondent to an affirmance of the judgment, since the question of whether the conclusions of law legitimately flow from the findings of fact always remains open for investigation.—*Robins v. Paulson*..... 459
29. *Briefs—Statement of the Case.* Where appellant states in his brief the essential facts of the case, although not at the beginning, and makes reference to the place in the record where they can be found, it is a sufficient compliance with rule 8 of the supreme court, which provides that "briefs shall contain a clear statement of the case, so far as deemed material by the party, with reference to the pages of the transcript for verification."—*Drumheller v. American Surety Co.*..... 530
30. *Appealable orders—Allowance of Attorney Fees in Administration of Estate.* The order of the court denying the petition of an attorney in a probate proceeding for the allowance of his fees for services rendered the executor of a decedent's estate is not an appealable order, since the allowance of such fees comes up properly on the accounting made by the executor, at which time he is entitled to credits for reasonable charges paid by him for legal services, to be allowed as part of the expenses of administration, and only the orders made upon such accounting are final ones.—*Nash v. Wakefield*..... 556
31. *Interest of Appellant.* Where one has sufficient interest to be made a party to an action, he cannot be denied an appealable interest in the cause, should the judgment be against him.—*State ex rel. Race v. Cranney*..... 594
32. *Harmless Error—Restraining Order—Vacation.* The denial of a motion to vacate a restraining order cannot be urged as error, where the parties to the action had voluntarily entered into a stipulation that the order should be continued until the final determination of the cause.—*Maggs v. Morgan*..... 604
33. *Review—Findings of Fact—Presumptions in Favor of Conclusions of Law.* Where the evidence is not brought

APPEAL—CONTINUED.

See CERTIORARI; CRIMINAL LAW, 7; DIVORCE, 1; HABEAS CORPUS; PLEADINGS, 5; PROHIBITION, WRIT OF, 1-4.

ASSAULT.

Assault With Intent to Rob—Instructions—Lesser Offense. Where the defendant was upon trial on an information charging him with an assault with intent to steal the property of another, it was not error to refuse a requested instruction that the jury could bring in a verdict of attempt to commit robbery.—*State v. Fenton* 325

ASSIGNMENT.

Assignment in Blank—Authorized Completion—Effect. The fact that an assignment of a mortgage was made in blank to an unnamed assignee would not affect the right of such assignee to maintain action thereon, where the assignee's name was afterwards inserted in the blank with the express assent of the assignor.—*Fidelity Insurance, etc., Co. v. Nelson* 340

ATTORNEY AND CLIENT.

Attorneys—Admission of Aliens—Citizenship—Eligibility of Japanese. Under Laws 1895, p. 178, § 6, which provides that no person shall practice law in the state who is not a citizen of the United States, a Japanese is not entitled to admission to practice, since he is ineligible to citizenship, under Rev. St. U. S., § 2169, which restricts the right of naturalization "to aliens being free white persons and to aliens of African nativity and to persons of African descent."—*In re Yamashita* 234

See **APPEAL**, 25, 30; **JURY**, 3.

BANKRUPTCY.

1. *Jurisdiction of Court and of Trustee.* Although the United States bankruptcy act makes it the duty of the trustee in bankruptcy to set apart the bankrupt's exemptions, such duty is merely ministerial, and the power to make an order setting apart to a bankrupt certain property as exempt is vested by the same statute in the bankruptcy court.—*Smalley v. Lauge-nour* 307
2. *Same—Power to Set Apart Exemptions.* A bankrupt being obligated to schedule all his property in his

BANKRUPTCY—CONTINUED.

- petition for bankruptcy—that claimed as exempt as well as that not so claimed—the bankruptcy court has jurisdiction to pass upon the character of all his property, and set apart the exemptions allowed by law.—*Id.* 307
3. *Same—Rules of Supreme Court.* The supreme court being empowered by the bankruptcy act to prescribe all necessary rules for carrying it into effect, and having provided by rule that no trustee need be appointed in certain cases, the failure to appoint a trustee under such circumstances would not affect the jurisdiction of the bankruptcy court to make a valid order with reference to the bankrupt's exempt property.—*Id.* 307
4. *Presumptions as to Validity of Proceedings.* Where the trial court found that an order of the bankruptcy court setting apart property as exempt was "regularly made," it cannot be objected on appeal that the order was made without notice to the creditors, there being nothing in the record rebutting the presumption that all the necessary steps were taken to give it validity.—*Id.* 307
5. *Judgment of Court—Relates Back to Filing of Petition.* A judgment in the bankruptcy court relates back to the institution of the bankruptcy proceedings, and, where it had adjudged certain property exempt from debts as a homestead, a sale in the state courts of such property under execution was void, although the execution sale was prior to the award of exemption in bankruptcy, but subsequent to the initiation of the proceedings.—*Id.* 307

See JUDGMENT, 2.

BANKS AND BANKING.

Payment of Forged Check—Liability for Negligence. A bank which pays a forged check drawn upon it in the name of a depositor may, if it acts within a reasonable time, recover the amount thereof from the bank which took the check in course of business, and negligently paid the money upon the indorsement of the check by the payee named, without inquiry into

BANKS AND BANKING—CONTINUED.

its genuineness, or without requiring any identification of the person presenting such check for payment, or any showing that he was lawfully the holder thereof.—*Canadian Bank of Commerce v. Bingham*..... 484

BILL OF PARTICULARS.

Admissibility in Evidence. A bill of particulars furnished by plaintiff in response to a motion by defendant is admissible in evidence on the part of defendant, although no order against plaintiff to furnish the bill is shown by the record as ever having been made.—*American Copper, Brass & Iron Works v. Galland-Burke B. & M. Co.*..... 178

BONDS. See DAMAGES, 5.**BOUNDARIES.**

Sale of Land According to Survey—Variance in Plat—Effect. Where there is a discrepancy between a survey and a plat of lands, the survey controls when it can be ascertained; and one who purchases with reference to the monuments and boundaries acquires title regardless of the lines shown by a recorded plat.—*Olson v. Seattle* 637

BURGLARY.

1. *Entry.* In a prosecution for burglary, a sufficient entry to sustain a conviction is shown, where it appears that a window was broken by one person, who reached in and removed stores from the building and handed them to another.—*State v. Boysen*..... 338
2. *Accomplices.* An accomplice who takes goods handed him from a building by another who has effected a burglarious entry is liable as a principal.—*Id.*..... 338

CANCELLATION OF INSTRUMENTS. See EQUITY.**CARRIERS.**

1. *Lien—Enforcement.* Where a carrier, having a lien upon goods for freight and wharfage, had never surrendered possession thereof to the sheriff upon an at-

CARRIERS—CONTINUED.

- tachment against the goods, its subsequent sale of the goods to satisfy its lien would be legal.—*Koyukuk Mining Co. v. Van De Vanter*..... 385
2. *Same—Pleading—Variance.* Where a complaint in an action was founded on the theory that defendant, while acting as custodian of goods under a levy by the sheriff, had converted same to its own use plaintiff could not recover upon a contract to the effect that defendant had a lien on the goods for freight and wharfage charges and had agreed to notify plaintiff in case it became necessary for it to dispose of the goods.—*Id*..... 385
3. *Same—Disposition of Surplus.* Where a carrier has sold goods for a sum in excess of its lien for freight and wharfage charges, the court may properly order the excess turned over to the county treasurer, under Bal. Code, § 5966, subject to the order of the party entitled thereto.—*Id*..... 385
4. *Breach of Contract to Carry Passenger—Measure of Damages.* In an action against a transportation company for failure to perform its contract to deliver plaintiff and his men at their destination, plaintiff is entitled to recover what it cost to live at the point where they were compelled to disembark, the cost of supplies and outfit to take them from there to their destination, the loss of time occasioned by not being landed at their point of destination, and the value of wages in their proposed line of work, which the party lost by reason of the delay (*Ransberry v. North American T. & T. Co.*, 22 Wash. 476, followed).—*Bullock v. White Star Steamship Co*..... 448
5. *Same—Evidence—Rate of Wages.* In an action for damages for causing plaintiff to disembark at Nome, while his contract of carriage required that he should be landed on Port Clarence Bay, evidence of the rate of miners' wages current at Nome was admissible, where there was testimony that they were the same at both points, and where it is shown that plaintiff lost several days' time at Nome, while preparing to outfit for the trip to Port Clarence Bay.—*Id*..... 448

CARRIERS—CONTINUED.

6. *Same—Relevancy of Evidence—Release of Damages.* Where the plaintiff was claiming damages on account of the loss to himself by reason of the delay and extra expense he was put to on account of defendant's failure to carry him and his men to their destination, and was not seeking to recover for damages suffered by the men in his employ, defendant was not entitled to put in evidence the release by one of the men of all damages on his own account.—*Id.*..... 448
7. *Same—Sources of Information.* In an action against a transportation company for failure to carry passengers to their destination according to contract, to which the defense of impossibility of performance was interposed on the ground that at the time of its failure the waters of the bay at the point of destination were ice-locked, the defendant is not entitled to put in evidence the sources of its information.—*Id.*.... 448
8. *Same—Act of God—Ice Blockade.* A transportation company that has contracted to deliver passengers at a destination in Alaska, and made no contract excusing the non-performance in case the ice had not cleared from the port, cannot invoke the failure of the ice to disappear as an act of God for which it should not be held responsible.—*Id.*..... 448
9. *Same—Limitation of Carrier's Liability—Construction of Contract.* Plaintiff bought a ticket from Seattle to Port Clarence, about one hundred miles north of Nome, Alaska, but the voyage was abandoned at Nome by the carrier, because of reports of ice in Port Clarence Bay. The steamer ticket, signed by both parties, provided that "if the purchaser of this ticket cannot for any reason be safely landed at the port of destination upon arrival of the vessel thereat, he may be landed at the next port reached by the vessel upon the then voyage at which such landing can be safely made." *Held*, that an instruction which told the jury, in effect, that such provision of the contract did not apply because the voyage had been abandoned at an intermediate point, was properly given.—*Id.*..... 448

CERTIORARI.

1. *When Lies—Remedy by Appeal.* The supreme court will not review an order of the superior court restraining interference with a receiver's possession of a certain building which was claimed by other parties, since there is a remedy by appeal from such order.—*State ex rel. Norris Safe & Lock Co. v. Superior Court* 177
2. *When Lies—Absence of Remedy by Appeal.* Certiorari will lie for the review of the judgment of the superior court determining the question of public use and necessity in proceedings for the appropriation of private property, in the absence of a statute permitting appeal from an adjudication upon that question.—*State ex rel. Smith v. Superior Court* 219

CITIZENSHIP. See ATTORNEY AND CLIENT.

COMITY. See TRUSTS, 2.

COMMUNITY PROPERTY. See CONTRACTS, 4; HOMESTEAD, 2-7.

CONSTITUTIONAL LAW.

1. *Legislative Powers—Inheritance Tax.* The absence in the constitution of specially delegated power to the legislature of this state to enact laws for the taxation of inheritances is not to be construed as a restriction of the right, under the provisions of the Bill of Rights, which declare in art. 1, § 1, that "all political power is inherent in the people, and governments derive their just powers from the consent of the governed," and in art. 1, § 30, that "the enumeration in this constitution of certain rights shall not be construed to deny others retained by the people," since legacies and inheritances are but creatures of the law, and natural subjects for legislative control, in the absence of constitutional prohibition.—*State v. Clark* 439
2. *Same.* Laws 1901, p. 67, providing for the taxation of inheritances is not invalid by reason of exempting some and laying proportional taxes on different ones, since the charges provided for are upon the passing of the estate by succession and are not a tax upon property,

CONSTITUTIONAL LAW—CONTINUED.

- and hence do not conflict with art. 7 § 1, 2, 5, of the state constitution, which require all property to be taxed uniformly according to its value in money.—*Id.* 439
3. *Same—Equality of Taxation.* The exemption in the inheritance tax law (Laws 1901, p. 68, § 2) from the provisions of the act of sums below \$10,000 when the estate passes to direct heirs and kindred is not invalid as violating the constitutional requirement of equality in taxation, for the reason that it does not extend the same exemption to devises to collateral heirs or strangers to the blood, since there is no inequality provided among members of the same class, and such rule of equality does not forbid a liberal classification for purposes of taxation.—*Id.* 439
4. *Sale of Goods in Bulk—Restrictions on Right—Due Process.* The act of March 16, 1901 (Laws 1901, p. 222), to regulate the purchase, sale, transfer and incumbrance of stocks of goods, wares or merchandise in bulk, and declaring same void under certain circumstances, is a rightful exercise of legislative power, under the police powers of the state, for the protection of the public and the prevention of frauds among individuals, and hence not a violation of the constitutional prohibition against depriving persons of their property without due process of law, on the ground of restricting the rights of certain individuals to dispose of their property.—*McDaniels v. J. J. Connelly Shoe Co.* 549
5. *Same—Class Legislation.* An act restricting retail merchants from transferring their stocks of merchandise in bulk, without making provision for the payment of creditors, is not class legislation within the meaning of the constitution, merely because it does not apply to all owners of property, so long as it applies alike to all persons in the class engaged in retailing merchandise.—*Id.* 549
6. *Same—Restraint of Trade..* Such an act is not in restraint of trade, since it does not prevent the sale of stocks of goods in bulk, but merely restricts the application of the proceeds, when stocks are sold in that manner.—*Id.* 549

See CORPORATIONS, 2.

CONTEMPT.

Orders of Court—Failure to Obey. Failure to comply with an order of court directing that the property of a corporation be turned over to a receiver will not subject a person to punishment for contempt, where he was not a party to the proceeding in which the receiver was appointed and in which the order was made, and where he retains possession of the property in good faith in the belief that it probably belongs to others than the corporation.—*State v. Denham*..... 643

CONTINUANCE.

Insufficiency of Showing.. A motion for continuance was properly denied, when there was not a sufficient showing of diligence, nor that the desired evidence was not cumulative.—*Maggs v. Morgan*..... 604

CONTRACTS.

1. *Novation—Substitution of Debtors—Evidence—Conversations Between Original and Substituted Debtor.* Conversations between a debtor and one who assumed his obligation under a new contract are admissible, in an action by the creditor against the substituted debtor for the purpose of showing the understanding arrived at by the parties to the novation.—*Sutter v. Moore Investment Co.*..... 333
2. *Same—Sufficiency of Evidence..* In an action upon a contract by novation wherein a new debtor was substituted for the old, a nonsuit was properly refused where it appeared that plaintiff refused to supply a restaurant keeper with meats for his business owing to non-payment of bills due; that defendant agreed to pay the debtor's obligation to plaintiff and the latter agreed to accept the defendant instead of the original debtor; that as part of the agreement the receipts of the restaurant business were turned over to defendant; and that further goods were furnished on the credit of defendant under the new agreement and bills rendered to defendant, who made part payment on both the old and the new accounts.—*Id.*..... 333
3. *Same—Contract Made by Corporate Employee—Liability of Corporation.* Evidence that the manager of the

CONTRACTS—CONTINUED.

- defendant company, at the time the alleged novation was entered into, called plaintiff up by telephone and said: "This is the Moore Investment Company, Mr. Moore talking," was sufficient to establish that the contract was entered into by the manager in his representative capacity rather than as an individual.—*Id.*..... 383
4. *Contract to Erect Building—Action for Breach—Evidence.* In an action for damages for failure to construct a building on community property according to contract, the wife cannot object to evidence of alterations made under an oral agreement in which she had not joined, since she would be bound by any contract made by her husband for the benefit of the community property.—*Anderson v. Harper* 378
5. *Building Contract—Alterations—Liability of Sureties.* Where a building contract contemplates the possibility of changes in the plans and specifications, a surety upon the bond of the contractor must be regarded as having consented in advance to alterations in the contract and cannot escape liability on the ground of alterations having been made without the express consent of the surety.—*Drumheller v. American Surety Co.*..... 530
6. *Same—Making Owner a Sub-Contractor—Effect.* A surety on a building contract cannot complain that the contractor permitted the obligees to construct a portion of the work and deduct the value thereof from the contract price, when the contract itself contemplated that a portion of the work might be performed by sub-contractors, and the obligees merely occupied that relation toward the contractors.—*Id.*..... 530
7. *Same.* A provision in a building contract that there shall be no alterations made except upon the written order of the architect relates solely to changes in the work shown on the drawings and specifications and not to changes in the employment of the men engaged in performing the work.—*Id.*..... 530
8. *Same—Liquidated Damages—Submission of Claim to Architect.* The provision of a building contract requiring disputes as to claims for damages to be submitted to the architect, or to arbitrators, has no application to

CONTRACTS—CONTINUED.

- another provision providing liquidated damages for failure to complete the building within a stipulated time.—*Id.* 530
9. *Contract of Employment—Admissibility of Parol to Vary.* Where a written contract for commissions to a salesman provides that goods returned by customers shall not be considered as sold, nor the salesman entitled to commissions thereon, and, further, that defendant reserves the right to reject any and all orders for any good and sufficient reason, parol evidence is inadmissible for the purpose of showing that defendant agreed as an inducement to the contract that the salesman should have a commission on all orders sent in and accepted by defendant.—*Ross v. Portland Coffee & Spice Co.* 647
10. *Same—Salesman—Right to Commissions.* Where a salesman's contract for commissions provided that he should be paid monthly on all sales made during the preceding month, but that goods returned by customers should not be considered as sold, the salesman is entitled to commissions only upon that portion of an order for goods delivered to the customer and retained by him, when the terms of the order provided that part of the goods were to be delivered at a certain time and the "balance as ordered," and that goods should be sent under a warranty, subject to the customer's approval.—*Id.* 647
11. *Same.* Under a contract giving a salesman commissions at the end of each month on the sale of goods made by him, if not returned by the customer, he is entitled to commissions upon orders taken by him which were enforceable on the part of the vendor as binding contracts of sale, although providing for future delivery, if the order provided for their shipment on or before a certain date, and contained no conditions as to approval or right of countermand by the customer.—*Id.* 647

See CARRIERS, 8, 9; DAMAGES, 1, 2, 5, 6; MUNICIPAL CORPORATIONS, 10; SALES, 1; SPECIFIC PERFORMANCE; WAREHOUSEMAN, 1, 2.

CONVERSION. See TROVER AND CONVERSION.

CORPORATIONS.

1. *Authority of Officers.* When a corporation permits certain officers to manage its business, it is responsible for their acts, even in the absence of the action of the board of trustees, unless it is affirmatively shown that their acts were unauthorized.—*Anderson v. Wallace Lumber & Mfg. Co.*..... 147
2. *Creation by Special Act—Laws of Sister State—Presumption as to Validity.* Where the laws of a sister state duly authenticated are placed in evidence showing an act specially incorporating plaintiff as a corporation, no presumption can be indulged that the law is invalid because such an act would be unconstitutional in this state (*Gunderson v. Gunderson*, 25 Wash. 459, distinguished).—*Fidelity Insurance, etc., Co. v. Nelson*..... 340

See EMINENT DOMAIN, 1; INSOLVENCY.

COSTS.

Attorney's Fees—Recovery by Several Defendants. Statutory attorney fees are allowable to each of several defendants who answer separately, under Bal. Code, § 5171, which provides that "in all actions where there are several defendants not united in interest, and making separate defenses by separate answers, the court may award costs to such defendants as recover judgments in their favor."—*Koyukuk Mining Co. v. Van De Vanter*..... 385

COUNTIES.

Compensation of Surveyors. County surveyors are entitled to compensation only for the days necessarily occupied in the discharge of the duties of that office, under Laws 1889-90, p. 302, § 2, which provides that "the county surveyor shall also receive \$5 per day for each day actually engaged in his duties as such officer," and under Laws 1895, p. 418, § 30, amendatory to the act of 1890, classifying counties and fixing salaries of officers, which provides that all "officers paid a per diem under the provisions of this act shall only be paid for the time actually and necessarily spent in the discharge of their duties."—*Sayles v. Walla Walla County*..... 194

See PROHIBITION, WRIT OF, 4.

CRIMINAL LAW.

1. *Requested Instructions—Harmless Error.* A judge is not required to give requested instructions in the language of the party requesting them, however pertinent such language may be, but may instruct upon such points in his own language.—*State v. Anderson*..... 14
2. *Incompetency of Juror—Duty of Prosecuting Attorney to Inform Court.* Where the prosecuting attorney who has inquired into the facts connected with an accusation of crime, and indorsed the names of witnesses upon an information laid by him, knows that a person called as a juror is a material witness to controverted facts constituting the offense, it is his duty to so inform the court, to the end that he may assist the administration of justice in upholding the constitutional guaranty of trial by an impartial jury.—*State v. Stentz*..... 134
3. *Instructions—Comment on Facts.* The use by the court of the language "that in making the assault he intended to use whatever force might be necessary to overcome the prosecuting witness and accomplish his purpose—that of robbery," does not amount to a comment on the testimony, where it was immediately preceded in the same instruction by the charge, "if you believe from the evidence beyond a reasonable doubt that at the time in question he committed an assault upon the prosecuting witness for the purpose of robbery."—*State v. Fenlon*..... 325
4. *Same—Credibility of Witnesses.* A charge to the jury that "you are judges of the credibility that ought to be given to the testimony of the different witnesses, and you are not bound to believe anything to be a fact because a witness has stated it to be so, provided you believe from all the evidence that such witness is mistaken, or has knowingly testified falsely," is a proper statement of the law, without the addition of the qualifying words, "unless corroborated by other competent evidence."—*Id.* 325
5. *Argument of Prosecuting Attorney—Harmless Error.* A case will not be reversed because of a misstatement of the law made by the prosecuting attorney in addressing the jury, when there was apparently no intent to misstate the law, and no instruction was asked by the de-

CRIMINAL LAW—CONTINUED.

- fendant from the court for the purpose of correcting the misstatement.—*Id.* 325
6. *Excessive Punishment.* A sentence of twelve years in the penitentiary upon a conviction for assault with intent to rob will not be disturbed on appeal as being excessive punishment, when it appears that the defendant was a dangerous man, of depraved mind, and that the instrument used was liable to cause loss of life.—*Id.* ... 325
7. *Appeal by State.* Under Bal. Code, § 6500, subd. 7, restricting the state's right of appeal in criminal cases to orders setting aside the indictment or information, orders arresting judgment on the ground the facts do not constitute a crime, or some material error in law not affecting the acquittal of the prisoner on the merits, the state has no right of appeal, where defendants, who have been discharged on habeas corpus, thereafter procure a dismissal of the proceedings against them and are awarded a judgment for costs on their preliminary examination.—*State v. Murrey*..... 383
8. *Admissibility of Evidence—Certified Constable's Bond.* A copy of the bond of a constable, certified by the county clerk, is admissible in evidence to establish the official character of an individual as constable, since the county clerk is the proper custodian of the bonds of constables, under Laws 1889-90, p. 34, which makes such officer the custodian of the official bonds of all county and township officers.—*State v. Yourex*..... 611
9. *Warrant of Arrest—Validity.* Under Bal. Code, §§ 6678, 6683, 6695, which require only the substance of the complaint to be recited in a warrant of arrest for misdemeanor, a warrant is not void on its face when it authorizes the officer to arrest defendant for defacing a building, described as the property of B. "and divers other persons," further reciting that it was not the property of defendant.—*Id.* 611
10. *Same.* The fact that a warrant for the arrest of defendant for defacing a building belonging to private parties recited that the building was upon the public highway would not render the warrant void on its face, inasmuch as there are circumstances when such a building may lawfully be upon the public highway.—*Id.* 611

CRIMINAL LAW—CONTINUED.

11. *Same—Objections to Evidence—Waiver.* Where a warrant of arrest had been admitted in evidence without objection, except to the purported return indorsed on the back thereof, which was ruled out, it was not error to permit the warrant itself to be taken to the jury room, although containing the return on its back which was not in evidence, since the defendant waived all objections by permitting the introduction of the warrant in evidence without asking for the obliteration or concealment of the indorsement.—*Id.* 611
12. *Same—Validity of Warrant—Question of Law.* The question of whether a warrant of arrest was either valid or void upon its face being one of law, it was not error for the court to charge the jury that the warrant authorized an officer to make the arrest, where the court had already determined in favor of its validity.—*Id.* 611
13. *Instructions—Inferences from Facts.* In a prosecution for murder, the refusal of requested instruction that no unfavorable inference should be drawn against the defendant from the fact that he carried a loaded revolver upon his person at the time of and immediately prior to the commission of the act for which he was being tried, was not error, since the inferences deducible from the facts in evidence were questions wholly for the jury.—*Id.* 611
14. *Same—Informing Jury of Penalty After Their Retirement.* The fact that, after a jury in a prosecution for murder had retired to the jury room, they were brought back into court at their own request, and informed as to the statutory penalty for the crime of manslaughter, would not constitute error.—*Id.* 611
15. *Evidence—Harmless Error.* Permitting the officer who received the custody of an extradited prisoner to testify for what crime he was extradited was harmless error, where all the proceedings in extradition, except the warrant therefor issued by the president of the United States, had been put in evidence, since, in the absence of a contrary showing, it would be presumed that the proceedings were regular, and that the warrant of extradition was in accordance with the other proceedings which were shown of record.—*State v. Roller* 692

CRIMINAL LAW—CONTINUED.

16. *Trial Upon Different Crime—Abatement.* Where the crime for which defendant is placed on trial is not the one for which he was extradited, objection should be raised by plea in abatement, presenting a question of law for the court upon the record.—*Id.* 692
See ASSAULT; BURGLARY; EMBEZZLEMENT; HABEAS CORPUS; HOMICIDE; JURY, 2; RAPE; WITNESSES, 4-6.

DAMAGES.

1. *Liquidated Damages—Showing of Actual Damage Unnecessary.* Under a contract providing for liquidated damages, it is not necessary to show in what manner or to what extent the party claiming thereunder has been actually damaged, but upon establishing a breach of the condition entitling him to such damages he should be awarded the stipulated sum.—*American Copper, Brass & Iron Works v. Galland-Burke Brewing & Malting Co.* 178
2. *Same—Hearsay Evidence.* Conversations had by plaintiff with a former employee of defendant tending to show that defendant suffered no actual damage by reason of plaintiff's delay in furnishing goods contracted to be delivered at a stipulated time under penalty of liquidated damages, are inadmissible on the ground of being hearsay.—*Id.* 178
3. *Excessive Damages.* A verdict for \$6,090 for injuries to plaintiff's leg will not be disturbed as excessive, where there was testimony that ulcerations caused by the injury were permanent and that the plaintiff would probably be partially disabled for life.—*Jordan v. Seattle*.... 298
4. *Same.* Where there is no evidence of passion or prejudice on the part of the jury, and where the trial judge, who has seen the witnesses and heard the testimony, has refused a new trial urged on the ground of excessive damages, the supreme court will not interfere with the verdict.—*Morton v. Moran Bros. Co.* 362
5. *Bonds—Liquidated Damages or Penalty.* Where the vendor of land, upon which there was a mortgage, unpaid taxes and a five-year contract for cutting timber held by third parties, gave a bond to the vendees in a stipulated sum, conditioned that if the obligors should on or before

DAMAGES—CONTINUED.

six months from the date of the bond procure the satisfaction of the mortgage and remove the other incumbrances on the land, then the obligation should be void, the bond must be construed as one not for liquidated damages, but as imposing a penalty under which the obligees were entitled to recover only the actual damages suffered by them.—*McDaniels v. Gowey*..... 412

6. *Double Assessment—Breach of Contract and Conversion.* In an action for damages for breach of contract to take logs cut by plaintiff on defendant's land, and for the conversion of plaintiff's buildings and camp equipment necessary in the performance of such contract, and which he was entitled to remove at the expiration of the contract, a verdict determining loss of profit under the contract and assessing damages for the appropriation of the buildings, etc., would not be a double assessment of damages.—*McCorkle v. Mallory*..... 632
7. *Compensation for Personal Disfigurement.* In an action for personal injuries resulting from the negligence of another, the injured party is entitled to compensation for mental suffering and distress of mind on account of personal disfigurement.—*Gray v. Washington Water Power Co.* 665

See ACTION, 1, 2; CARRIERS, 4-6; CONTRACTS, 8; EMINENT DOMAIN, 11, 12, 16-18; LIMITATION OF ACTIONS, 1.

DECEIT.

1. *Sale of Corporate Stock—Evidence—Former Values.* In an action for damages for the difference between the selling price and the actual value of corporate stock, which plaintiff alleged he had been fraudulently induced to sell at less than its real value, evidence is inadmissible for the purpose of showing at what prices stock had been sold two years prior to the sale in question.—*McNicol v. Collins*. 318
2. *Same.* Where deceit in the sale of corporate stock was charged against defendants, evidence of the purchase price of the stock two years before, at the time it was purchased for plaintiff by one of the defendants, was admissible, in connection with testimony that plaintiff

DECEIT—CONTINUED.

- had agreed to divide the stock with such defendant at the purchase price, in order to rebut the charge of deceit.—*Id.* 318
3. *Same—Wages of Employees.* The amount of wages paid employees by a corporation is irrelevant for the purpose of establishing the value of its shares of stock.—*Id.* 318
4. *Same—Cross-Examination.* Where plaintiff, in order to show confidential relations existing between himself and one of the defendants in an action founded on deceit had testified to their joint ownership of a building, it was not error to permit defendant to testify more fully upon the subject, although not involved in any way in the subject-matter of the action.—*Id.* 318

DESCENT AND DISTRIBUTION.

1. *Decedent's Estate—Allowance for Family Support—Nunc Pro Tunc Order.* Upon the hearing of objections made to an *ex parte* allowance for the support of minor children, it is within the power of the court to make a *nunc pro tunc* order covering the same items included in the original order, where there has been due notice given of such subsequent hearing, and the items are proper ones for allowance under the law.—*In re Murphy's Estate.* 9
2. *Same—Right of Father to Allowance.* Under Bal. Code, § 6220, which provides that upon the death of the husband the court shall set apart for the use of the widow and minor children all the property of the estate exempt from execution, and, if this is insufficient for the support of the widow and minor children, the court shall make such further reasonable allowance out of the estate as may be necessary for the maintenance of the family during the settlement of the estate, a surviving husband is as much entitled to an allowance for the maintenance of minor children as the widow would be.—*Id.* 9
3. *Same—Funeral Expenses of Minor Child.* Physician's charges and funeral expenses incurred for the benefit of minor children are properly allowable as a part of the family allowance.—*Id.* 9

DESCENT AND DISTRIBUTION—CONTINUED.

4. *Same—Funeral and Medical Expenses of Adult Child—When Allowable Out of Estate.* Where the expenses of an adult child's last sickness and funeral have been paid by a father from his personal funds, he is entitled to reimbursement from such child's distributive share of its mother's estate, prior to any disposition thereof other than application toward the debts of the estate.—*Id.*..... 9
5. *Decedent's Estate—Allowance for Support of Minor—Necessity.* A minor child is entitled to an allowance out of, and not to the whole of, the personal property of his deceased parents, for his support during his minority, and then only upon a showing of necessity therefor.—*Stewin v. Thrift*..... 36

See PROHIBITION, WRIT OF, 2.

DISMISSAL AND NONSUIT.

1. *Dismissal of Action—Want of Prosecution.* The dismissal of an action which had been pending for seven years without action upon defendant's demurrer to the complaint would not be an abuse of the court's discretion; nor would the fact that the statute permits a defendant the right to bring a case on for hearing deprive the court of its power to clear its docket of stale actions.—*Langford v. Murphey*..... 499
2. *Dismissal for Failure to Prosecute—Excuse—Absence of Counsel.* Excusable neglect justifying the vacation of an order of dismissal for want of prosecution of an action is not established by a showing that counsel were engaged in other courts at the time the case was called for trial.—*Spokane, etc., Copper Co. v. Colfelt*..... 628
3. *Same—Absence of Witness.* The absence of a material witness will not excuse the failure of a party to appear on the day set for trial, when there is no showing of diligence to procure the attendance of such witness, nor any allegation of the facts expected to be proved by him.—*Id.* 628

DIVORCE.

1. *Suit Money on Appeal—Refusal to Order Payment.* In an action for divorce the husband will not be required to

DIVORCE—CONTINUED.

- pay suit money to the wife to enable her to conduct her case on appeal, where it is apparent from the showing made that such an order for the payment of suit money would be futile and vain by reason of the husband's inability to comply therewith.—*Bachelor v. Bachelor*..... 203
2. **Venue.** Under Bal. Code, § 5718, which authorizes actions for divorce to be brought in the county where plaintiff resides, the refusal to grant a change of venue to the county of defendant's residence would not constitute error.—*Bachelor v. Bachelor*..... 639
3. **Same—Refusal to Pay Suit Money—Effect on Right to Defend.** The failure of the defendant in a divorce proceeding to comply with the court's order for the payment of alimony and suit money to the plaintiff will not warrant the court in striking the defendant's answer, inasmuch as it is the policy of the law that divorces be not granted without the interposition of defenses to the action.—*Id.* 639

DRAINAGE.

- Warrants on Ditch Fund—Payment in Order of Issuance—Interest.** Under Laws 1895, p. 144, § 7, which provides that warrants drawn on a ditch fund created by assessment for the payment of cost of construction of a ditch should be paid "in the order of their issue," and under Laws 1893, p. 76, which provides that all warrants shall draw interest from date of presentation and non-payment thereof, the holder of warrants against a ditch fund is entitled to their payment, with accrued interest, in the order of issuance, even if the payment of interest on such warrants prevents payment of subsequent warrants in the hands of other holders.—*State ex rel. Rush v. St. John*..... 630

EJECTMENT.

1. **Title by Adverse Possession—Instructions.** Upon an issue of title by adverse possession in an action of ejectment, it was proper for the court to charge the jury that the open, notorious, peaceable possession of real estate, with a claim of right thereto, for the period prescribed

EJECTMENT—CONTINUED.

- by the statute of limitations vested title in plaintiffs.—
Kline v. Stein..... 189
2. Evidence—Transactions With Decedent. Under Bal. Code, § 5991, which excludes evidence of transactions had with decedent, in an action of ejectment against the executors of the estate of a decedent from whom plaintiffs claimed to derive title sufficient to establish adverse possession, evidence on plaintiffs' part of having been put in possession of the land by decedent under an agreement for a deed which was subsequently executed, but by mistake failed to incorporate all the land of which they had been put in possession under their purchase, is inadmissible.—*Id.*..... 189

ELECTIONS AND VOTERS. See MUNICIPAL CORPORATIONS, 6.

EMBEZZLEMENT.

- Sufficiency of Information—Allegation of Agency and Ownership of Property.* An information charging defendant, as the agent of an insurance company, with embezzling a promissory note, the property of said insurance company, sufficiently states the offence, under Bal. Code, § 7119, which provides that any agent or person to whom any money or other property shall be intrusted, who fraudulently converts the same to his own use, shall be deemed guilty of larceny.—*State v. Whitworth*. 47

EMINENT DOMAIN.

1. *Electric Railway Companies.* Under Laws 1899, p. 147, granting electric railway corporations the power of eminent domain, such corporations are thereby vested with legal capacity to prosecute proceedings for the appropriation of private property.—*State ex rel. Smith v. Superior Court*. 219
2. *Sufficiency of Petition.* Condemnation proceedings for the appropriation of a portion of a dedicated street for electric railway purposes are warranted, although Laws 1901, p. 147, § 1, forbid the exercise of such power with respect to public roads or streets, when it appears from the petition therefor that the street in question lay upon

EMINENT DOMAIN—CONTINUED.

- tide-lands and was constantly washed by the rise and fall of the tides; that it had never been used as a street but had merely been platted and dedicated for that purpose; that it could not be so used without filling in or the construction of an elevated trestle or bridge; that the city had authorized an electric railway to be constructed in such street on condition that the holder of the franchise would construct a trestle and roadway for the use of teams as well as for its cars; and that the company was seeking, in compliance with the ordinance of the city, rather to make a street where none existed before instead of being chargeable with the appropriation of a street.—*Id.* 219
3. *Appropriation of Easements.* The construction of a trestle or bridge in a street constitutes an appropriation of an adjoining lot owner's easements of light, air and access, for which he is entitled to just compensation to be ascertained by a jury.—*Id.* 219
4. *Condemnation Proceedings—Railroad Right of Way—Market Value of Land—Expert Witnesses—Scope of Cross-Examination.* A large discretion is reposed in the trial court in the matter of allowing cross-examination of expert witnesses where market value is involved; and where such witnesses were allowed on direct examination to fix the value of a stone quarry condemned for a railroad right of way and the damages resulting from its appropriation, it was not error to permit cross-examination concerning the methods by which the witnesses arrived at their conclusions as to the injury, what elements of damages they had considered, and the reasons for their conclusions.—*Seattle & Montana Ry. Co. v. Roeder.* 244
5. *Same—Segregation of Land—Valuation on Parcels.* In an action to condemn lands for a right of way, it was not error to permit defendant's witnesses to segregate the lands sought to be appropriated and then place valuations upon the different parcels, especially where plaintiff was the first to pursue that course in arriving at a basis of compensation.—*Id.* 244
6. *Same—Evidence—Increased Difficulty of Operation of Quarry.* In condemnation proceedings for the appropri-

EMINENT DOMAIN—CONTINUED.

- ation of a railroad right of way along a stone quarry, evidence is admissible for the purpose of showing that the most advantageous way to work the quarry is by blasting, and that this could not be done without great care and increased expense by reason of the proximity of the railroad.—*Id.*..... 244
7. *Same—Royalties—Admissibility of Lease.* In such proceedings a lease of the quarry by the owners is admissible in evidence for the purpose of showing the royalty paid by a lessee for the stone, as tending to fix both the value of the land and of the leasehold interest.—*Id.*..... 244
8. *Same—Evidence as to Market Value.* Evidence that a stone quarry had a market value in the county, but was probably not saleable there because of the lack of local purchasers with money enough to pay for it, would not constitute prejudicial error, where the inquiry was as to the damages suffered by the appropriation of such quarry for railroad right of way.—*Id.*..... 244
9. *Same—Rebuttal Testimony.* The refusal to admit rebuttal testimony on the subject of the location of shale in certain portions of a ledge of stone was not error where plaintiff had gone into the question in his case in chief.—*Id.*..... 244
10. *Argument of Counsel—Waiver by Defendant—Effect.* Where counsel for defendants waive argument on their part after the opening argument has been made for plaintiffs, it is not error for the court to refuse to allow further argument on the part of plaintiffs, under Cal. Code, § 4993, subd. 5, which provides that "the plaintiff or party having the burden of proof may by himself or one counsel address the court and jury upon the law and facts of the case, after which the adverse party may address the court and jury in like manner by himself and one counsel, or by two counsel, and be followed by the party or counsel first addressing the court."—*Id.*.... 244
11. *Same—Measure of Damages.* In condemnation cases the measure of damages is the fair market value of the land taken for railroad right of way at the time of the appropriation, together with the amount of depreciation, if any, in the value of the land not taken, and these re-

EMINENT DOMAIN—CONTINUED.

- spective amounts are to be ascertained without regard to any benefit that may result from the construction of the railroad.—*Id.* 244
12. *Same—Instructions.* The refusal of the court to charge as requested that the only elements which the jury should take into consideration as tending to reduce the market value are "those which are appreciable and substantial, and which will actually lessen the market value of the property taken," was not error, where the court, in its own language, correctly stated what elements of damage the jury might consider.—*Id.* 244
13. *Same—Presumption as to Privilege of Crossing Right of Way.* A requested instruction to the effect that no presumption arises that defendants will be refused the privilege of crossing plaintiff's right of way afoot from one part of defendant's lands to another was properly refused, since the presumption would naturally be the other way.—*Id.* 244
14. *Same—Presumption of Continuance of Existing Rental Value.* A requested instruction that if the jury found the quarry property was held by a lessee they would not be justified in assuming that the amount of rental paid under the lease would continue in the future as the fair rental value was properly refused, since the existing rental value would be presumed to continue until the contrary was shown.—*Id.* 244
15. *Same—Reliance on View of Premises.* Where there is a conflict in the testimony, it is not error to charge the jury that they may resort to the evidence of their senses on the view to determine the truth.—*Id.* 244
16. *Same—Elements of Damage—Elimination by Contract.* An agreement of a railroad company to construct culverts to carry water across its right of way from one part of defendants' lands to another part where it was needed would not eliminate the possible obstruction of such flow as an element of damage in the appropriation of the right of way, when the agreement does not bind the railroad not to obstruct the flow, nor to carry it across the right of way as convenient for defendants as its natural flow.—*Id.* 244

EMINENT DOMAIN—CONTINUED.

17. *Same—Value of Land for Special Purpose.* Where quarry land is appropriated in condemnation proceedings, the jury are entitled to take into consideration as an element of damage the value of the land with the stone in it, but cannot take into consideration the profits that might be realized on the stone after its removal from the ledge.—*Id.* 244
18. *Same—Excessive Damages.* A verdict for \$80,000 for the appropriation of a right of way through a stone quarry will not be disturbed, when there is nothing to indicate passion or prejudice on the part of the jury, and there was testimony on the question of injury to the property ranging from \$6,000 to \$175,000.—*Id.* 244

See CERTIORARI, 2; INJUNCTION, 1, 2.

EQUITY.

Cancellation of Instrument—Equitable Jurisdiction. Where defendant set up a contract and asked its specific performance, by way of cross complaint to an action against him for conversion, the court is warranted in decreeing a cancellation of the contract when it appears to be non-enforceable, although plaintiff did not ask for such relief, under the rule that, when equitable jurisdiction attaches for any purpose, it extends to the whole controversy.—*Jordan v. Coulter* 116

See LACHES.

ESTOPPEL.

1. *Grounds of.* An insurance solicitor who takes a promissory note for a premium due on a policy issued by his company, although the note is merely made payable to the order of the maker and by him indorsed in blank, is estopped to deny either the insurance company's ownership of the note or his own agency.—*State v. Whitworth*. 47
2. *Same.* A railroad company sued for malpractice of its surgeon in treating one of its employees is estopped to say that the service was gratuitous, because he was not injured during work hours, when it had taken plaintiff to its hospital and entered upon his treatment without

ESTOPPEL—CONTINUED.

informing him that it was extending a charity, instead of making a return for the hospital dues it had collected from him during the course of his past employment.—
Sawdey v. Spokane Falls & N. Ry. Co. 349

See EXECUTORS AND ADMINISTRATORS, 1.

EVIDENCE.

1. *Admissibility of Original Instrument.* The admission in evidence of the original declaration of homestead instead of a certified copy thereof was not error, where it contained the endorsement of the county auditor showing the date of its filing and its entry of record.—*Smith v. Veysey* 18
2. *Admissibility of Broken Car Wheels.* Where it was claimed that the derailing of a train was caused by the breaking of wheel flanges on some of the cars it was not error to permit the introduction in evidence of a broken flange picked up by a witness several months afterwards at the place of the accident, when he had testified to being on the train at the time of the accident and to having gathered up a number of broken pieces of flanges and placed them in a heap, and that the piece offered in evidence was picked up in that vicinity and resembled some of them, though he could not identify it.—*Roberts v. Port Blakely Mill Co.* 25
3. *Res Gestae—Declarations of Vice Principal.* The declarations of a general superintendent of a railway made on the scene of a train wreck within three hours after it occurred, and tending to explain or account for the same, are admissible in evidence as part of the *res gestae*.—*Id.* 25
4. *Conversations.* Conversations had by witnesses in regard to the subject-matter of an action are inadmissible when not had in the presence of the party sought to be charged thereby.—*McNicol v. Collins* 318
5. *Interrogatories—Introduction in Evidence—Conclusiveness of Answers.* A party who has propounded interrogatories to his adversary may put the answers in evidence without being bound by their statements against his interest, but, under Bal. Code, § 6012, he is entitled to con-

EVIDENCE—CONTINUED.

- tradict such answers by other evidence.—*Sawdey v. Spokane Falls & N. Ry. Co.* 349
6. *Disputed Contract—Evidence of Surroundings.* Where the pleadings put in issue the terms of a contract between the parties, evidence of circumstances surrounding the contract is admissible.—*Anderson v. Harper*.... 378
7. *Admissibility of Unstamped Instrument.* The absence of an internal revenue stamp would not affect the admissibility of the instrument as evidence in an action in a state court.—*Foster v. Pacific Clipper Line*..... 515
- See BILL OF PARTICULARS; CARRIERS, 5-7; CONTRACTS, 1-4, 9; CRIMINAL LAW, 8, 15; DAMAGES, 2; DECEIT, 1-3; EJECTMENT, 2; EMINENT DOMAIN, 4-9, 15; HOMICIDE, 4-6; MASTER AND SERVANT, 3, 5, 6; MINES AND MINERALS, 5; MUNICIPAL CORPORATIONS, 12-17; NEGLIGENCE, 5; SALES, 3; STREET RAILWAYS, 1; TROVER AND CONVERSION; WAREHOUSEMEN, 1; WILLS, 3-5.

EXECUTION.

- Levy on Money—Satisfaction of Judgment—Money Withheld by Agreement of Parties—Liability of Debtor for Interest.* A levy of execution upon money constitutes a satisfaction of the judgment, though not paid over by the sheriff until the determination of another suit, where it was stipulated by the judgment creditor that it should be held by the sheriff to abide the result thereof; and in such case the judgment creditor would not be entitled to the issuance of an alias execution for the purpose of recovering interest on the sum the sheriff had been withholding.—*Adams v. National Bank of Commerce*. 20

See BANKRUPTCY, 5.

EXECUTORS AND ADMINISTRATORS.

1. *Estoppel—Administrator's Individual Property Included in Inventory.* The fact that an administrator, by mistake or in ignorance of legal rights, included his own property in an inventory of the estate would not estop him from subsequently asserting his ownership.—*Filley v. Murphy*..... 1

EXECUTORS AND ADMINISTRATORS—CONTINUED.

2. *Failure to File Inventory—Removal—Discretion of Court.* Bal. Code, § 6208, authorizing the court to revoke letters testamentary, where the executor fails to file his inventory of the estate within the period prescribed by statute, or within such further time, not exceeding three months, as the court shall allow, is directory instead of mandatory, and the authority of the court to remove in case of a failure of the executor to comply rests in its sound legal discretion.—*Clancy v. McElroy*. 567

See APPEAL, 30; JUDGMENT, 3; JURY, 1; WILLS, 1.

EXEMPTIONS. See BANKRUPTCY, 1-5; HOMESTEAD; JUDGMENT, 2.**FISH AND FISHERIES.**

1. *Fishing—Location of Traps—Validity.* Where the location of a fishing trap was invalid by reason of the site being occupied by a prior locator, such invalid location could not ripen into a valid location at the expiration of the prior locator's fishing license under which he fished that site.—*White Crest Canning Co. v. Sims*. 374
2. *Same.* Where an attempted location of a fishing site is invalid as against original locators thereon it cannot be valid as against anybody else.—*Id.* 374
3. *Same—Abandonment—Sufficiency of Evidence.* In an action to enjoin defendants from operating a fishing trap upon a certain location claimed by plaintiff as a prior locator, a finding that such location had been abandoned was warranted, where it appeared that the site was located in March by plaintiff's assignors by driving piles and posting thereon the number of the locator's license; that nothing more was done by the locators thereon, nor their license even recorded; that in the latter part of September of the same year, defendants located the same site and at that time found no posts or piles on the site to indicate that it was held by other locators.—*Id.* 374

FIXTURES. See LANDLORD AND TENANT, 4.

FRAUD. See DECEIT.

FRAUDS, STATUTE OF.

Contract for Sale of Land—Mutuality of Agreement—Signature of Vendee. Where a contract for the conveyance of land, though purporting to be a mutual agreement, was signed by the vendor only, but had been drawn up on the letter head of the vendee by its secretary, who wrote the vendee's name in the body of the instrument, and gave the vendor a letter to the president of the vendee company, signed by the secretary, requesting the payment of the balance of the purchase price to the vendor in fulfillment of the contract, the memorandum of sale must be held as showing a binding obligation as to both parties.—*Anderson v. Wallace Lumber & Mfg. Co.*..... 147

See CONTRACTS, 1, 2.

GARNISHMENT.

1. *Liability of Sheriffs—Statutes—Repeal.* Laws 1885-86, p. 43, § 19 (Bal. Code, § 5367), which provides that a sheriff or constable may be garnished for money of the defendant in his hands, was not repealed by the later enactment on the subject of garnishments, when such subsequent act (Laws 1893, p. 95) contained no provision respecting the garnishment of public officers, and its repealing clause merely provided that "all acts and parts of acts in conflict with this act be and the same hereby are repealed."—*Pierce v. Commercial Investment Co.*.... 272

2. *Issues.* Where garnissees answer that they have no property of the principal defendant, a controverting affidavit that they bought a stock of goods in bulk from defendant under circumstances prohibited by statute sufficiently raises an issue, under Bal. Code, § 5409, which provides that, if the plaintiff should not be satisfied with the answer of the garnishee, he may controvert the same by affidavit in writing signed by him stating that he has good reason to believe that the answer of the garnishee is incorrect, and in what particular he believes it is incorrect.—*McDaniels v. J. J. Connelly Shoe Co.*.... 549

HABEAS CORPUS.

Effect of Appeal—Stay of Criminal Prosecution. An appeal from an order denying the writ of habeas corpus

HABEAS CORPUS—CONTINUED.

to a prisoner charged with the commission of a crime will not operate as a stay of proceedings on the criminal charge pending the determination on appeal of the habeas corpus proceedings.—*State v. Fenton*..... 825

HIGHWAYS. See **EMINENT DOMAIN**, 2; **PROHIBITION, WRIT OF**, 4.

HOMESTEAD.

1. *Cancellation of Sheriff's Sale—Evidence.* In an action to set aside a sheriff's sale of real estate on the ground that it was exempt as a homestead, the admission of evidence as to residence thereon after the filing of the declaration of homestead would not constitute error, where such evidence was a part of the testimony showing residence on the land at the time of and prior to the declaration, was restricted to a period of four months just preceding and following the filing of the declaration, and was introduced merely for the purpose of showing *bona fide* residence.—*Smith v. Veysey*..... 18
2. *Right of Minor Child to Select.* Where neither the husband in his lifetime, nor the widow after his death, made any selection of a homestead in community realty, a minor child cannot claim one after the death of his parents, as against the other heirs of the community, since Bal. Code, §§ 6219, 6222, which provide for a homestead to the widow and minor children, must be construed in connection with the general homestead law, which has superseded the provisions contained in such sections permitting the selection of a homestead to be made by minor children.—*Stewin v. Thrift*..... 36
3. *Assignment to Minor—Harmless Error.* The denial of a minor's claim to have the use of his mother's portion of community real property assigned to him upon her death, as permitted by Bal. Code, § 5246, will not be reversed, when it appears that at the time of the order he was within sixteen days of the age of majority, and there is no showing that the use of the property for that limited period would have been of value to him.—*Id.*.... 36
4. *Selection.* Mere occupancy of property as a home amounted to a selection of a homestead, prior to the

HOMESTEAD—CONTINUED.

- enactment of the homestead law of 1895, and a selection made at any time before sale was sufficient to entitle the claimant to exemption.—*In re Feas's Estate* 51
5. *Same—Community Estate—Selection After Wife's Death.* Under the statute permitting either the husband or wife to claim a homestead in community property while both are living, and vesting it in the survivor on the death of either, it is the spirit and intention of the law that a husband may, after his wife's death, select a homestead from the community property for the benefit of himself and family.—*Id.* 51
6. *Same—Attainment of Majority by Children—Effect.* Where a homestead in community property had been once lawfully claimed, it continued as a homestead even though the children have attained their majority and left the parental roof.—*Id.* 51
7. *Abandonment.* The fact that a husband who claimed a homestead in community property belonging to himself and his deceased wife had made conveyances thereof to his children did not constitute an abandonment of the homestead, so as to subject the land to sale for debts of the deceased wife's interest in such community estate.—*Id.* 51

See BANKRUPTCY, 5; EVIDENCE, 1.

HOMICIDE.

1. *Information—Description of Weapon—Variance.* Proof that a murder was committed with a cigar cutter, under an information charging the killing as done "with an iron instrument," does not constitute a variance, when the cigar cutter was an iron instrument.—*State v. Anderson* 14
2. *Same.* An information charging defendant with killing another "with an iron instrument, then and there a deadly weapon," though general in its description of the weapon, is good against an objection made after verdict.—*Id.* 14

HOMICIDE—CONTINUED.

3. *Same—Time of Commission of Offense.* It is not a fatal variance to fail to prove that the crime was committed on the particular day alleged in the information, but, under Bal. Code, § 6845, it is sufficient if it be proved to have been committed within the time in which an action may be commenced on account thereof.—*Id.* 14
4. *Evidence.* In a prosecution for murder, it was not error to refuse to permit a witness to state what he understood was meant by a remark made by the deceased just before the altercation in which he was killed, inasmuch as the understanding of the witness as to its import was immaterial.—*Id.* 14
5. *Murder—Self-Defense—Evidence—Reputation of Deceased—Admissibility.* In a prosecution for murder, where the plea of self-defense was interposed, it was error to exclude testimony as to the general reputation of the deceased as to resorting to the use of firearms and other deadly weapons when engaged in quarrels, although defendant's knowledge thereof had not been previously shown as a foundation for such proof, where the only objection to the question was general and not merely to the order of the proof.—*State v. Ellis* 369
6. *Same.* Evidence of the habit and reputation for carrying and using deadly weapons may be received where the nature of the defense indicates that the defendant had reasonable apprehensions of great danger to his person, and the exclusion of such evidence will not be held to be without prejudice because of the fact that ample testimony of the reputation of the deceased as an aggressive, quarrelsome, dangerous, fighting man had been introduced.—*Id.* 369
7. *Same—Apparent Danger—Instructions.* Where the defense of justifiable homicide is interposed, it was error to charge the jury that they could not consider threats against defendant nor the dangerous character of the deceased, unless they found that immediately preceding the killing the deceased had committed some overt act towards carrying his threats into execution, or had made an attack upon the defendant of such a

HOMICIDE—CONTINUED.

character as would justify the defendant in using deadly weapons in repelling the same, since it is sufficient to excuse homicide if the danger be apparently imminent.—*Id.* 263

See CRIMINAL LAW, 13, 14.

HUSBAND AND WIFE. See CONTRACTS, 4; DESCENT AND DISTRIBUTION, 2; DIVORCE; HOMESTEAD, 2, 5, 7.

INDICTMENT AND INFORMATION. See EMBEZZLEMENT; HOMICIDE, 1-3.

INHERITANCES. See CONSTITUTIONAL LAW, 1-3

INJUNCTION.

1. *Action to Restrain Trespass Upon Land—Interest of Plaintiff.* One who has paid a substantial portion of the purchase price for real property held by him under contract of purchase has such an interest in the land as will entitle him to maintain injunction, where the public authorities seek to take the same for a public use without first making compensation therefor.—*Olson v. Seattle*..... 637

2. *Same—Variance—Amendment of Pleading on Appeal*
In an action to enjoin the appropriation of land for a public use, although the complaint alleged ownership in fee and the proof showed less than a fee simple title, the complaint will on appeal be treated as amended to correspond to the proofs, where no objection was raised to the variance on the trial.—*Id.* 637

INSOLVENCY.

Receivers—Allowance of Claim Against Insolvent Corporation—Right of Creditor to Judgment in Separate Action. Where a claim against an insolvent corporation has been passed upon by the receiver and the court and allowed, it is in effect a judgment in the insolvency proceedings, and the refusal of the court to enter judgment upon the default of such corporation in a separate action involving the same matter would not

INSOLVENCY—CONTINUED.

constitute error.—*Rosario Strait's Packing Co. v. Sun-set Packing Co.* 50

See BANKRUPTCY.

INSTRUCTIONS. See APPEAL, 13; ASSAULT; CARRIERS, 9; CRIMINAL LAW, 1, 3, 4, 12-14; EJECTMENT, 1; EMINENT DOMAIN, 12-15; HOMICIDE, 7; MASTER AND SERVANT, 14; MINES AND MINERALS, 1-3; NEGLIGENCE, 2, 3, 6, 7; STREET RAILWAYS, 2-4; TRIAL, 1-3, 9, 11-15, 17, 18.

INTEREST. See DRAINAGE; EXECUTION.

INTERNAL REVENUE. See EVIDENCE, 7.

INTERPLEADER.

Action to Determine Conflicting Claims to Property—Sufficiency of Complaint. Bal. Code, §§ 4843-4845, which provide for actions to determine conflicting claims to property, do not require the complaint to allege that plaintiff has been sued or suit threatened, or that he is in danger of having judgment rendered against him twice for the same property, but any allegation which shows the fact that each of two different parties claims the property is sufficient.—*Daulton v. Stuart* 562

INTERROGATORIES. See EVIDENCE, 5.

JUDGMENT.

1. *Collateral Attack.* A judgment of the superior court admitting a person of the Japanese race to citizenship, shows upon its face that the court was without authority, and such judgment may be attacked at any time and in any proceeding.—*In re Yamashita* 234

2. *Res Judicata—Award of Exemptions in Bankruptcy.* A judgment of a bankruptcy court that certain property of the bankrupt was exempt from his debts is *res judicata* in an action of ejectment brought by the purchaser of such property at execution sale upon a judgment against the bankrupt.—*Smalley v. Laugenour*. 307

JUDGMENT—CONTINUED.

3. *Same—Allowance of Attorney Fees in Probate Proceedings.* Where the superior court sitting in probate has passed upon the claim of an attorney for fees for services rendered the executor of an estate, and has rendered judgment thereon, such judgment in the probate proceeding is a bar to a civil action by the attorney against the estate for the recovery of the value of his services.—*Nash v. Wakefield*..... 581
4. *Same—Denial of Plaintiff's Lien for Taxes—Effect on Right to Subrogation.* The judgment in an action to determine the priorities between mortgagees of the same property which expressly decided that plaintiff had no lien for taxes paid by him, because the property was personally instead of realty, and the statute afforded the mortgagee a lien when he paid taxes on real estate only, is not a bar to a subsequent action between the same parties involving the same taxes, where the subsequent action seeks to recover the amount of the taxes paid by plaintiff as a prior mortgagee and to have the amount paid adjudged a lien on the property, and that he be subrogated to the rights of the county in the enforcement of such lien.—*Dunsmuir v. Pt. Angeles, etc., Power Co.*..... 586

See APPEAL, 2, 3, 4; BANKRUPTCY, 5; INSOLVENCY; TRIAL, 8.

JURISDICTION.

Petition Filed in Probate—Right to Treat as Civil Proceeding. Where a citation to a former administrator has been issued in probate, and he appears and demurs to the petition upon which it is based, on the ground that it raises an issue as to the title and right of possession of property, the demurrer should be overruled, inasmuch as the court has jurisdiction under the code procedure to treat the petition as in the nature of a complaint in a civil proceeding, and to settle the issues thereunder by proper trial.—*Filley v. Murphy*..... 1

See EQUITY.

JURY.

1. *Probate Proceedings—Right to Jury Trial.* Where the pleadings in a case filed in probate raise the issue as to the right of possession of real and personal property, a jury trial is demandable, under Bal. Code, §4967, which provides that an issue of fact in an action for the recovery of specific real or personal property shall be tried by a jury, unless a jury be waived.—*Filley v. Murphy*..... 1
2. *Competency of Juror—Knowledge of Material Facts—Challengeable for Bias.* Where one whose name had been indorsed on an information as a witness for the state is drawn as a juror, he is incompetent to serve on the ground of bias, even though he disclaims any, when he has knowledge of material controverted facts in the case; and the action of the court in forcing the defendant to exhaust his last peremptory challenge against such juror is reversible error.—*State v. Stentz*..... 134
3. *Same—Implied Bias—Relation of Attorney and Client.* A client of an attorney for one of the parties, called as a juror, is not subject to challenge on the ground of implied bias, under Bal. Code, § 4984, which provides that a challenge for implied bias may be taken when the juror stands in the relation of attorney and client to the adverse party.—*McCorkle v. Mallory*..... 632

See CRIMINAL LAW, 2; TRESPASS, 1.

LACHES.

- Available Without Special Plea.* Laches need not be specially pleaded as an equitable defense, but defendant may avail himself thereof, when laches is shown and claimed on the hearing of the facts.—*Gay v. Havermale*

622

LANDLORD AND TENANT.

1. *Wrongful Eviction—Complaint—Allegation of Rent Payment.* The payment of rent is not a condition precedent to the quiet enjoyment of leased premises, and therefore need not be alleged as performed in the complaint in an action for wrongful eviction.—*Spencer v. Commercial Co.*..... 520

LANDLORD AND TENANT—CONTINUED.

2. *Same—Covenant Against Subletting.* Under a covenant in a lease whereby the tenant agrees "not to sublet the whole of said premises nor assign this lease without the written consent" of the landlord, the latter is not entitled to re-enter and evict the tenant because of the fact that he sublet parts of the premises less than the whole.—*Id.*..... 520
3. *Same—Forcible Eviction—Right of Landlord.* The common-law right of a landlord to forcibly regain possession of leased premises has been abrogated under the statutes of this state giving a remedy upon the tenant's failure to perform the conditions of the lease, and this is so, notwithstanding an agreement permitting the landlord to take possession by force.—*Id.*..... 520
4. *Same—Removal of Fixtures.* Where a tenant enters into a new lease, making no mention of a former lease or tenancy, and with no reservation for removal of fixtures placed under the former lease, his right to remove fixtures is thereby precluded.—*Id.*..... 520

See ACTION, 1.

LIENS. See CARRIERS, 1-3.

LIMITATION OF ACTIONS.

1. *Injuries Caused by Smelter Fumes—Accrual of Action.* The fact that a smelter would inevitably occasion the damage for which plaintiff sues would not start the running of the statute of limitations from the first operation of the smelter, but the right of action would accrue only at the time the fumes began to cause damage.—*Sterrett v. Northport Mining & Smelting Co.* 164
2. *Action Against Surviving Partners—Suspension of Statute of Limitations.* The right of partnership creditors to enforce their claims against surviving partners being postponed under the provisions of Bal. Code, §§ 6189, 6190, until after the settlement of the deceased partner's estate, the running of the statute of limitations against such claims would be suspended during such period.—*Brigham-Hopkins Co. v. Gross.* 277

LIMITATION OF ACTIONS—CONTINUED.

3. *Commencement of Action.* The service of summons and copy of the complaint before the bar of the statute of limitations intervenes, and the filing of the complaint subsequent to the initiation of the bar, is not the commencement of action sufficient to stop the running of the statute of limitations, within the meaning of Bal. Code, § 4807, which provides that, so far as the statute of limitations is concerned, an action shall be deemed commenced when the complaint is filed.—*Cresswell v. Spokane County*..... 620

LOGS AND LOGGING.

- Lien on Manufactured Lumber.* One who assists in cutting logs in the woods for a saw mill is entitled to a lien upon the finished product after manufacture at the mill, as long as such product remains under the control of the manufacturer, when the latter is the same party who employed the lien claimant to work in the woods.—*Robins v. Paulson*..... 459

MANDAMUS.

1. *Board of Appraisers—Sale of Public Lands—Discretionary Power.* Mandamus will not lie to compel the board of appraisers of state lands to readvertise and resell a tract of tide land upon the application of a purchaser who offers twenty-five per cent more than it was sold for, since Laws 1897, p. 240, § 15, which authorizes a resale under such circumstances, makes it discretionary with the board whether or not a resale shall be ordered.—*State ex rel. Bussell v. Bridges*..... 268
2. *Issuance of Tax Deed—Parties to Proceeding.* Upon a petition for mandamus to compel a public officer to convey lands purchased at tax sale, private persons who claim an interest in the land are proper party defendants, under the provisions of our code which permit the rights of all persons in the subject-matter in controversy to be determined in one action.—*State ex rel. Race v. Cranney*..... 594
3. *Unnecessary Issuance.* Under the rule that the extraordinary writ of mandamus will never issue in any case where it is unnecessary, it was error for the court

MANDAMUS—CONTINUED.

to issue such writ compelling defendant to publish on or about April 15th a directory of subscribers to its telephone system, where the defendant had answered that it was then engaged in compiling and publishing such a directory in the regular course of its business, which it would have ready for distribution early in the month of April.—*State ex rel. Bauer v. Sunset Tel. & Tel. Co.*..... 676

MASTER AND SERVANT.

1. *Coal Mining—Timber for Props—Duty of Operator to Supply—Negligence of Master—Assumption of Risk.* Under Bal. Code, § 3178, which provides that the operator of a coal mine shall supply the workmen therein with timbers sufficient to properly secure the workings from caving in, and these shall be delivered at the entrance of the working place, a positive statutory duty is imposed upon the operator of the coal mine, and where a neglect of such duty proximately contributes to an injury received by a miner, the operator is liable, even if the miner continued work after knowledge of the failure to supply the timbers, since the doctrine of assumption of risk is inapplicable in the face of the positive injunction of the statute.—*Green v. Western American Co.*..... 87
2. *Same—Injury to Miner—Contributory Negligence.* Whether a miner was guilty of contributory negligence in working in a crosscut of a coal mine, after the discovery of rock in the roof of the crosscut, which he could not timber against because of a failure to supply him with the necessary material therefor, is a question for the jury, when there was no showing that the danger was so obvious and imminent that no ordinarily prudent man would assume the risk.—*Id.*.... 87
3. *Same—Evidence of Geological Formation.* Evidence showing the natural condition of a coal mine, as regards its geological formation, is competent and material in an action by a miner to recover for injuries received from an accident therein, for the purpose of establishing his surroundings, the care necessary to be taken by him, and the care the operator should take in timbering and operating the mine.—*Id.*..... 87

MASTER AND SERVANT—CONTINUED.

4. *Same—Witnesses—Examination.* The refusal of the court to allow plaintiff on his re-direct examination to testify as to whether it was rock or coal that fell upon him was not an abuse of discretion when he had not been questioned on that point on direct examination.—*Id.* 87
5. *Same—Incompetency of Vice Principal—Evidence.* Where the complaint charged as an element of negligence the employment of an incompetent pit boss, evidence was competent and material, showing the duties of a pit boss as to inspecting the working places, keeping the chutes clear of coal, timbering for the purpose of keeping rocks from falling, and repairing defects when complained of; as to the extra hazardous work in unblocking clogged chutes and the selection by the pit boss of inexperienced men therefor; as to the discharge of miners on calling the attention of the boss to the omission to make repairs; as to the general complaint of the inability to get sufficient timbers to properly prop their working places; and as to the general reputation of the pit boss for incompetency and disregard for the lives and limbs of the miners.
Id. 87
6. *Same—Proof of Specific Acts.* Specific acts of incompetency of the pit boss were admissible in evidence under the general allegation that he was ignorant and incompetent.—*Id.* 87
7. *Notice of Incompetency of Employee.* The master will be presumed to know the incompetency of a pit boss when specific acts of incompetency are shown, of such a nature, character and frequency that the master, in the exercise of due care, must have necessarily had them brought to his notice.—*Id.* 87
8. *Collection of Hospital Dues—Treatment of Employee—Malpractice—Gratuitous Treatment—Question for Jury.* Where a railroad company made a practice of deducting a certain portion of the monthly wages of its employees for hospital dues and taking care of sick or injured employees, irrespective of whether the illness was incurred in the regular course of employment, a question for the jury was presented as to whether

MASTER AND SERVANT—CONTINUED.

- treatment was gratuitous or by reason of contract relations, in the case of an employee who had been injured off the premises of the company after his day's work was done, and had been treated by the company surgeon at its hospital.—*Sawdey v. Spokane Falls & N. Ry. Co.*..... 349
9. *Injury of Employee—Malpractice of Surgeon—Liability of Master.* If a railroad company contracts for a consideration to treat its employees for any injury they may receive while in its employ, it is liable for the malpractice of the surgeon employed therefor, notwithstanding it exercised due care in the selection of such surgeon (*Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, distinguished).—*Id.*..... 349
10. *Same—Sufficiency of Evidence—Nonsuit.* In an action to recover damages for malpractice, the granting of a non-suit was erroneous, although a physician called by plaintiff had testified that his condition after treatment might have been the natural result from the character of his injury, when it appears that a second operation had been necessary, that the surgeon employed to assist therein pursued different treatment from that adopted by the surgeon in charge, and that another surgeon had testified that the treatment employed in the first instance was not the usual method in such cases. The necessity for a second operation of itself afforded some evidence that plaintiff had been subjected to unnecessary danger, delay in recovery, pain and suffering, and thus afforded a question for the jury to pass upon.—*Id.*..... 349
11. *Same—Contributory negligence—Question for Jury.* The question of plaintiff's contributory negligence was properly submitted to the jury, where it appeared that he was ignorant of the hazards incident to work aboard ship, and was taken by the foreman of defendant company away from his work in the foundry to help make repairs on a vessel; that the foreman went into the lower between-decks with a lighted candle, and after an examination returned, and ordered plaintiff to carry some boards down there by means of a ladder which the foreman had placed; that plain-

MASTER AND SERVANT—CONTINUED.

- tiff started down with a board and a lighted candle which he held by means of one arm and hand, and when near the foot of the ladder it tilted, and, fearing a fall, he stepped off the side of the ladder and fell to the bottom of the vessel through a hole located close to the foot of the ladder; that the hole was not visible by reason of the darkness, but was known to the foreman, and he had failed to warn plaintiff of it.—*Morton v. Moran Bros. Co.*..... 362
12. *Safe Appliances for Work—Defective Ladder.* The rule requiring the master to exercise reasonable care in providing the servant with reasonably safe appliances affords a right of recovery to a workman injured by reason of the defective condition of a beam made into a ladder by means of cleats nailed across it, and used by the foreman and workmen as a ladder in the construction of a high, steel-frame building, since the very necessities of work upon such a structure would impose the duty upon the master of furnishing adequate ladders.—*Ralph v. American Bridge Co.*..... 500
13. *Negligence—Proximate Cause—Concurring Acts of Master and Fellow Servant.* Even if the negligence of a fellow servant in constructing and adjusting the ladder concurred with that of the master in failing to supply a suitable ladder, it would not excuse the primary negligence of the master for injury to another of his servants.—*Id.*..... 500
14. *Same—Negligence of Third Parties—Instructions.* In an action against the contractor for the steel frame work of a building to recover for injuries received by reason of having been compelled to use a defective ladder, in which the defense was interposed that the ladder was made insecure through the prior acts of stone masons employed in connection with the building, an instruction is not misleading as localizing the position of the masons at the bottom of the work, when it charges the jury that if at the time plaintiff was injured certain stone masons were employed near the foot of the ladder in question, and if the plaintiff was injured on account of any act of theirs and not by negligent acts on the part of defendant, plaintiff could not recover.—*Id.*..... 500

MASTER AND SERVANT—CONTINUED.

15. *Torts of Servant—Joint Liability.* An action for tortious negligence may be maintained against the master and his employee jointly, where the injury was caused by the act of the latter (*Doremus v. Root*, 23 Wash. 710, distinguished).—*Howe v. Northern Pacific Ry. Co.* 569
16. *Fellow Servants—Fireman and Conductors.* The fireman and conductor on a train are not fellow servants, but the conductor stands as a vice-principal, for whose negligence the railway company is liable, where injury results therefrom to the fireman.—*Id.* 569
17. *Concurring Negligence.* Where the negligence of the master contributes to the injury of a servant, the master is liable, though the negligence of a fellow servant may be contributory.—*Id.* 569

See MINES AND MINERALS, 1-5; NEGLIGENCE, 13.

MINES AND MINERALS.

1. *Coal Mines—Ventilation—Duty of Operator—Death of Miner From Suffocation.* In an action to recover for the death of a workman in a coal mine caused by suffocation, an instruction was proper which set forth Bal. Code, §3165, to the effect that the operator of every coal mine shall provide a good and sufficient amount of ventilation for such persons as may be employed therein, and then charged the jury that "the purpose of this law is to provide a reasonably safe place for the men to work in, and that the ventilation of the working places of the men shall be such as to maintain them reasonably safe from dangerous gases by a good and sufficient ventilation of the mine. This is a positive duty imposed upon the operator and owner of the mine, and for the neglect of this duty the law holds such operator or owner liable if damages result therefrom."—*Czarecki v. Seattle & S. F. Ry. & Nav. Co.* 288
2. *Same—Assumption of Risk.* In such an action, it was proper to charge the jury that the degrees of care required of an operator of a coal mine and of the workmen employed underground differ; that "the miner or

MINES AND MINERALS—CONTINUED.

workman assumes only such risks and dangers as are open and apparent to him, or one in his position, and which are necessarily incident to his employment.”

Id. 288

3. *Same—Delegation of Master's Duty—Workman as Vice Principal.* An instruction that a loader was a vice principal, as to part of his work, when a portion of his duties was to keep the chutes open as an air way, was proper, where the necessary ventilation of the mine was a positive duty of the operator.—*Id.*..... 288
4. *Same—Concurring Negligence of Fellow Servant.* Where the negligence of the coal mine operator in failing to afford good and sufficient ventilation in the mine was the cause of injury to a miner, the fact that the act of a fellow servant concurred in producing the injury would not excuse the master.—*Id.*..... 288
5. *Same—Evidence—Notice to Operators—Complaints of Bad Ventilation.* Evidence that complaints of the insufficient ventilation of the mine were made to the managers about the time of the suffocation of deceased was admissible for the purpose of showing knowledge on the part of the operator of the condition of the mine.—*Id.*..... 288

See **MASTER AND SERVANT**, 1-7.

MORTGAGES.

Foreclosure—Redemption by Judgment Creditor. A judgment creditor had no right of redemption from a mortgage foreclosure sale which was made prior to the act of 1897 (Laws 1897, p. 75, §1o), which was the first enactment in this state conferring upon judgment creditors such right, but which expressly declared that rights of redemption from sales rendered prior thereto should remain unaffected.—*Geddis v. Packwood*..... 270

See **ASSIGNMENT; SUBROGATION.**

MUNICIPAL CORPORATIONS.

1. *Defective Sidewalks—Original Plan of Construction.* A city cannot relieve itself from liability for defective

MUNICIPAL CORPORATIONS—CONTINUED.

- streets, even if the defect were a part of the original plan of construction, instead of one arising from negligence to repair.—*Stone v. Seattle*..... 65
2. *Same—Negligence of City—Question for Jury.* In an action for personal injuries received by stepping into a hole left at the intersection of two sidewalks, it was error to grant a nonsuit when the evidence showed that, after the opening had been left at that point as a part of the original plan of construction, an electric light pole was so placed as to cast the hole in shadow at night, and that plaintiff stepped into the opening while passing along the walk at night, the shadow creating the appearance of an unbroken surface in the walk at that point.—*Id.*..... 65
3. *Excavations in Streets—Duty to Guard—Notice of Contractor's Negligence.* The duty to properly guard excavations in streets, although the work is carried on by an independent contractor, rests primarily upon the city; hence actual or constructive notice to the city that the contractor had failed to protect the public against an excavation by placing guards or signal lights there is not necessary in order to render the city liable for the non-performance of that duty.—*Drake v. Seattle*, 81
4. *Same—Contributory Negligence.* The question of plaintiff's contributory negligence in falling into a street excavation was one for the jury, where the evidence showed that plaintiff knew holes were being dug in the street in front of her house, but did not know their exact location, nor that there was a hole at the place where she fell, since there was nothing to indicate its presence, either in the way of barriers, lights or loose dirt; that the excavation was at the intersection of the street on which she lived and a cross street along which a car line ran; that in attempting to board a car at the street intersection she fell into a hole between the tracks, not having heard the warnings called out to her until she was falling and without having noticed there was an opening there.—*Id.*.... 81
5. *Same—Verdict Contrary to Instructions—Harmless Error.* The fact that the jury's verdict was contrary

MUNICIPAL CORPORATIONS—CONTINUED.

to an instruction charging them that the city was not negligent, if it used reasonable care to discover the dangerous condition of the street and the accident intervened before the lapse of a reasonable time between the discovery and the remedy of the defect, was not error, inasmuch as the city was chargeable with the primary duty of guarding excavations in its streets, and the neglect of the persons to whom that duty had been intrusted was the neglect of the city.—*Id.*..... 81

6. *Amendment of Charter—Submission to Vote.* The fact that a charter amendment consisting of seven sections was submitted to a vote of the people as one proposition instead of as seven would not invalidate the submission, under a charter regulation providing "that if more than one amendment be submitted at the same general election the same shall be submitted at such election in such manner that each proposed amendment may be voted on separately without prejudice to the others," where it was plainly the intention that the new provisions should be substituted as a whole for the old provisions, all the sections being part of one article devoted to but one special subject.—*State ex rel. Lowman & Hanford S. & P. Co. v. Riplinger* 281
7. *Same—Effect of Amendment—Repeal by Amendment—Expenditure of Library Fund—Powers Vested in Library Board.* The adoption of an amendment to the Seattle city charter providing that the library board shall alone have authority to expend the library fund, and shall certify every such expenditure to the city comptroller, who shall issue his warrants therefor to the city treasurer and the same shall be paid out of any money in the library fund not otherwise appropriated is a repeal, so far as the expenditure of the library fund is concerned, of art. 9, § 7, of the charter, which provides that warrants can be drawn only in pursuance of an order of the city council, and of § 12, of art. 9, which declares that all claims against the city of whatsoever nature shall be examined and allowed or disallowed by the auditing committee.—*Id.*.... 281
8. *Defective Sidewalks—Personal Injuries—Scope of Cross-Examination.* In an action to recover damages for in-

MUNICIPAL CORPORATIONS—CONTINUED.

- juries to plaintiff's leg caused by a defective sidewalk, where she has testified on direct examination merely that it cost her \$15 per month for medicine to swathe her leg, it was not error to refuse to allow cross-examination as to medical advice given by her physician.—*Jordan v. Seattle*..... 238
9. *Same—Knowledge of Defect.* The knowledge of plaintiff of a safer way around is immaterial in an action for injuries occasioned by a defective sidewalk, since a person has a right to travel upon the streets and walks of a city by the most direct course.—*Id.*..... 238
10. *Salaries of Officers—Charter Provisions—Evasion by Contract.* Under § 216 of the city charter of Tacoma, which provides that the city council shall fix by ordinance the salary of all other officers and employees than those fixed by charter, but "that said salaries shall never exceed the following" (designating certain officers and salaries and adding): "any other officer or agent, \$1,200 per annum," a contract between the city of Tacoma and the plaintiff, whereby the latter should overhaul, repair and revise the city's electric lighting system for a period of eight months in consideration of the sum of \$1,200, payable in monthly installments not exceeding \$150 per month, was virtually a contract of employment by the month, and hence void as being a violation of such charter provision.—*Alden v. Campbell*..... 332
11. *Defective Street—Notice to City—Allegations of Complaint.* In an action against a city for injuries received on account of a defective street, the complaint sufficiently alleges notice to the city of the defect, when it charges that the condition of the street had existed for considerable time and was well known to the city.—*Randall v. Hoquiam*..... 438
12. *Same—Admission of Evidence—Harmless Error.* In such an action, it was not prejudicial error to permit plaintiff to be asked if he made any search for lights after the injury, to which his answer was that he did not.—*Id.*
13. *Same—Evidence—Condition of Street Prior to Accident.* Evidence is admissible of the defective condition of a

MUNICIPAL CORPORATIONS—CONTINUED.

- street where an accident occurred, both at the time of the accident and prior thereto, since such evidence raises an implication of notice to the city.—*Id.* 435
14. *Same.* For the same reason, questions to the street commissioner as to the condition of the street are pertinent.—*Id.* L 435
15. *Defective Sidewalk—Action for Injuries—Evidence.* The admission of evidence of the defective condition of a sidewalk after an accident was not prejudicial error, when the evidence was merely cumulative testimony describing the walk at the time of the accident.—*Bell v. Spokane.* 508
16. *Same.* Where the question of notice to the city of the defective condition of a sidewalk is contested, testimony showing its condition both before and after the accident is admissible for the purpose of establishing knowledge of the defect on the city's part.—*Id.* 508
17. *Same—Claim for Injuries—Mistake in Date—Correction by Parol.* A claim for damages filed by an injured party with the city council in accordance with the requirements of the city charter is admissible in evidence, though the jurat attached thereto apparently indicates it was sworn to on the day prior to the injury, if it appears by parol testimony that the date was erroneous and that the claim was actually made out and sworn to after the accident and filed within the period prescribed by the charter for the presentation of such claims.—*Id.* .. 508
18. *Evidence—Variance.* In an action for injuries caused by a defective sidewalk, there is no variance between the claim filed with the city council and the proofs adduced on the trial, by reason of the fact that plaintiff testified she received the injuries complained of by having her foot caught between two planks, while the claim described the injuries as caused by her feet catching and stumbling over, upon, and against the nails projecting from the planks of the walk, and by reason of said planks having become loose, warped, decayed and shaky, whereby they bent and sank beneath the weight of one stepping upon them.—*Id.* 508

MUNICIPAL CORPORATIONS—CONTINUED.

19. *Limit of Indebtedness—Necessary Expenses.* Warrants issued by a city in excess of its constitutional limit of indebtedness are valid on the score of necessity for the perpetuation of its corporate existence, when such warrants were issued to cover the expenses of constructing a jail, boarding prisoners, feeding impounded stock, guarding quarantine patients, publishing notice of election, printing ballots, insurance on city buildings, services in making assessment rolls, city printing, postage and stationery for city officers, and necessary expenses of the city clerk.—*Gladwin v. Ames*..... 608
20. *Trusts—Diversion of Special Street Fund—Limitations.* Section 158 of the charter of the city of Tacoma, which provides that "all moneys received or collected by the treasurer upon assessments for improvement of streets, highways or alleys shall be kept as a separate fund and in no wise used for any other purpose whatever, except for redemption of warrants drawn against such fund," creates a trust relation between the city and a warrant holder, and where the city pays moneys out of such fund to a subsequent warrant holder, contrary to the statutory requirement that warrants should be paid in the order of issuance, the statute of limitations will not begin to run against action by the prior warrant holder to recover the amount due him from the city, until his discovery of the action of the city.—*New York Security & Trust Co. v. Tacoma*. 661

NEGLIGENCE.

1. *Defective Railway Cars—Action for Injuries—Nonsuit.* In an action for the death of a conductor of a logging train, caused by the derailing of the train, refusal of a nonsuit was proper, where the evidence showed that the train was loaded as usual, was traveling at the usual rate of speed, and that the track was not out of order; that the flanges on some of the car wheels were too thin to be safe, had flaws in them, and that they broke at the time of the accident; that such condition of the flanges makes a car unsafe and dangerous, especially when striking a curve; that a reasonable and ordinary inspection would have discovered the defect, and that

NEGLIGENCE—CONTINUED.

- the derailing of the cars occurred while the train was rounding a curve.—*Roberts v. Port Blakely Mill Co.*..... 25
2. *Same—Refusal of Requested Instructions on General Negligence.* The refusal of the court to give a general definition of negligence as requested by defendant is not error, where the court has correctly instructed the jury upon the specific negligence under consideration.
—*Id.* 25
3. *Same—Burden of Proof.* Where the court by its instructions has thoroughly impressed upon the jury that the burden was upon plaintiffs to establish negligence and that the jury must find by a preponderance of the evidence that it was the defendant's negligence which caused the injury, it was not error to refuse a requested instruction to the effect that negligence is never presumed, and that it was not the duty of defendant to explain how the accident occurred, or to show that defendant was not negligent.—*Id.* 25
4. *Personal Injuries—Disease Augmenting Injury.* One whose negligence occasions a personal injury to another is liable for the proximate consequences of his act, although these consequences may be aggravated and augmented by reason of the delicate health or organic tendency to disease of the person injured.—*Jordan v. Seattle.* 298
5. *Evidence—Declarations of Vice Principal—Res Gestae.* Declarations made regarding an accident, made immediately after its occurrence by a vice principal, who was the person through whose negligence it is charged as having occurred, are admissible in evidence as part of the *res gestae* (*Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, followed).—*Lambert v. La Conner T. & T. Co.* .. 346
6. *Reasonable Care of Plaintiff—Proximate Cause—Instructions.* An instruction conveying the idea that slight negligence on the plaintiff's part is sufficient to excuse negligence on the part of the defendant is erroneous, since the jury should be directed to the question as to whose negligence is the proximate cause of the injury.—*Atherton v. Tacoma Ry. & Power Co.* 395

NEGLIGENCE—CONTINUED.

7. *Same—Cause of Accident—Question for Jury.* An instruction assuming as a matter of law that there was negligence in the happening of an accident is erroneous, as that is always a question of fact.—*Id.* 395
8. *Pleading—Negativ ing Contributory Negligence.* The complaint in an action for negligence is not demurrable for failure to negative contributory negligence on the part of plaintiff, as that is always matter of defense.—*Randall v. Hoquiam* 435
9. *Careless Driving—Liability of Defendant—Sufficiency of Evidence.* In an action against defendant to recover on account of the negligence of the driver of one of its teams, a *prima facie* case sufficient to defeat nonsuit was made out, although there was no direct proof of the ownership of the team or the employment of the driver, where the evidence showed the damage was done by a wagon painted and lettered like those of defendant's, drawn by a horse resembling those owned by defendant; that one of its drivers had a team out the day of the accident; and that defendant's wagons had never been used except in its own business.—*Jones v. Swift & Co* 462
10. *Same—Question for Jury.* Whether the driver of a wagon was guilty of negligence in driving his wagon against the barriers guarding an excavation in the street, so as to cause them to fall upon plaintiff who was down in the excavation, presents a question for the jury, when the evidence shows that the streets were torn up in the digging of a man hole; that there was but a narrow passageway between the excavation and sidewalk, which was blockaded with teams; that the earth was piled up on three sides of the excavation, and between it and the blockaded teams; that the driver should have known from the conduct of the work that there was a man in the pit; that he attempted to drive between the blockaded teams and the pit, and in so doing drove up on the embankment thereby striking the boards and barrels used as a protection against the pit, knocking them down on the plaintiff, to his injury.—*Id.* 463
11. *Same—Contributory Negligence.* In such a case, the fact that the barrels and boards surrounding the pit

NEGLIGENCE—CONTINUED.

- were not securely fastened would not show as a matter of law contributory negligence on the part of plaintiff in going into the pit, but the question of plaintiff's negligence was properly for the jury.—*Id.* 462
12. *Accidental Injury—Proximate Cause.* Where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, and which would not have resulted in the injury excepting for a negligent act of the defendant, such negligence is the proximate cause of the injury, for which damages are recoverable.
—*Goe v. Northern Pacific Ry. Co.* 654
13. *Injury to Servant—Safe Place to Work—Question for Jury.* Where a common laborer, employed in a gravel pit in connection with the work of a steam shovel, ignorant of the mechanical structure of the boom and crane attached to the shovel, is ordered by the foreman to go out upon the boom to assist in righting things after the overturning of the shovel, without being warned of the dangers of the position, and, by reason of the slippery condition of the boom, falls and strikes the lever of the crane engine, thereby starting the machinery in motion, and in throwing out one hand to recover himself has it caught and ground in a cog wheel, the danger of the sudden starting of the crane engine being capable of avoidance by having the steam shut off completely by a valve for that purpose between the crane engine and the main engine of the shovel, a question of fact as to defendant's negligence is presented for the consideration of the jury, and it is for them to determine, from such a state of facts, the proximate cause of the injury.—*Id.* 654

See BANKS AND BANKING; DAMAGES, 3, 4, 7; ESTOPPEL, 2; EVIDENCE, 2, 3; MASTER AND SERVANT, 1, 2, 5-7, 9-17; MINES AND MINERALS, 1-5; MUNICIPAL CORPORATIONS, 1-5, 8, 9, 11-18; PRINCIPAL AND AGENT; STREET RAILWAYS, 1-4; TRIAL, 12, 18; WHARFINGERS.

NEW TRIAL.

1. *Grounds—Insanity of Witness.* The refusal of the trial court to grant a new trial on the ground of the insanity of one of the witnesses of the prevailing party will not

NEW TRIAL—CONTINUED.

- be disturbed, where the testimony of the witness as given on the trial appears clear and intelligent, without any indication of mental aberration, and the trial court upon determining the motion for new trial found that the witness, though subject to certain hallucinations, was capable of making an intelligent and connected statement upon his examination at the trial.—*Czarecki v. Seattle & S. F. Ry. & Nav. Co.* 288
2. *Refusal to Grant—Abuse of Discretion.* The refusal of a new trial on the ground of newly discovered evidence in the shape of witnesses who had lived in the same house with plaintiff and knew her condition, was not an abuse of the court's discretion, where the case had been pending a couple of years before the trial, had been tried once before about a year prior to the second trial, and no effort had been made during all that time to procure the testimony of such witnesses.—*Jordan v. Seattle*. 298
3. *Newly Discovered Evidence—Want of Diligence.* New trial on the ground of newly discovered evidence was properly denied, where it appears that before trial defendant had procured the names of the new witnesses upon written interrogatories propounded to plaintiff several months before trial, but through a want of diligence had failed to obtain their addresses as well.—*Bullock v. White Star Steamship Co.* 448
4. *Extension of Time for Filing Affidavits.* Refusal of an extension of time for filing affidavits in support of a motion for a new trial would not be error, where it appears that the affidavits would not establish a ground for a new trial.—*Id.* 448

NOVATION. See CONTRACTS, 1-3.

NUISANCE.

1. *Injuries Caused by Smelter Fumes—Sufficiency of Evidence.* In an action to recover damages for the destruction of plaintiff's farm for agricultural and fruit raising purposes, the denial of a nonsuit was proper, where the evidence showed that the smelter was located a mile away from plaintiff's land about the middle of the year 1898; that the fruit trees on plaintiff's land were having

NUISANCE—CONTINUED.

a thrifty growth in the fall of the year 1898; that in the spring of 1900, after the fumes from the smelter hung for several hours in the atmosphere, the blooms on the trees became blighted and nothing in the way of fruit formed; that the leaves had a brown, cooked appearance and the alfalfa appeared bleached; that no fruit was gathered from the orchard in 1900, and the strawberry crop was greatly damaged in that year; that some such effect was noticed during the year 1899, but not so much; that, as shown by expert testimony, the presence of sulphuric acid released in the atmosphere by the roasting of ores would produce such effects, and, if continued, would ultimately kill the vegetation in the vicinity.—*Sterrett v. Northport Mining & Smelting Co.*..... 164

2. *Same—Continuing Nuisance.* The operation of a smelter, although a lawful business, is one which is sure to destroy vegetation upon which the fumes and smoke therefrom may be precipitated, and hence constitutes a continuing nuisance for which damages are recoverable for any period within two years prior to the commencement of action.—*Id.*..... 164

OFFICE AND OFFICERS. See COUNTIES; GARNISHMENT, 1.

PARTIES. See APPEAL, 8, 17, 23, 24, 31; MANDAMUS, 2.

PARTNERSHIP.

Death of Partner—Settlement of Estate—Liability of Surviving Partners. After the settlement of a partnership estate upon the death of one of the partners, the creditors of the firm may maintain an action against the surviving partners for any balance of their claims remaining unpaid (*Brigham-Hopkins Co. v. Gross*, 20 Wash. 218, limited).—*Brigham-Hopkins Co. v. Gross*.... 277

See LIMITATION OF ACTIONS, 2.

PLEADING.

1. *Action on Written Contract—Prior Negotiations—Irrelevancy.* Paragraphs of a pleading containing averments relating to certain alleged oral conversations and agreements between the parties to an action were properly

PLEADING—CONTINUED.

- stricken as immaterial, where the pleading itself set up a written agreement subsequently entered into concerning the same subject-matter as the alleged previous oral agreement.—*Jordan v. Coulter*..... 116
2. *Variance—Action for Total Destruction of Property—Proof of Partial Destruction.* Under Bal. Code, § 4949, which provides that no variance shall be deemed material, unless it shall have actually misled the adverse party, the fact that plaintiff proved only a partial destruction of his property by reason of the fumes arising from defendant's smelter, while his complaint asked damages for the total destruction of his property, would be but an immaterial variance.—*Sterrett v. Northport Mining & Smelting Co.*..... 164
3. *Admissions in Answer.* Where the complaint set up a written contract between the parties, and followed this with allegations of other matters which it averred were actually a part of the contract, but omitted by mistake, and the admission of the answer was merely that "the contract set forth in said complaint is a true copy of the contract between the parties thereto," and the case was tried on the theory that defendant admitted nothing outside of the written contract, it was error for the court to charge the jury that defendant admitted by its answer that the contract was as alleged in the complaint.—*American Copper, Brass & Iron Works v. Galland-Burke B. & M. Co.*..... 178
4. *Amendment During Trial.* The refusal of the court to permit plaintiffs to amend their complaint during trial does not show abuse of discretion, when the amendment would introduce a new element of damages in addition to those claimed in the complaint.—*Anderson v. Harper.* 378
5. *Amendment on Appeal.* Where a party to an action was entitled to amend her pleading to correspond to the proof, the supreme court will on appeal, under the provisions of Bal. Code, § 6535, consider the amendment as made.—*Richardson v. Moore*..... 406
6. *Supplemental Pleadings—Discretion of Court.* Allowing defendant to file a supplemental answer is a matter with-

PLEADING—CONTINUED.

- in the discretion of the court, and will only be disturbed upon a showing of abuse.—*McDaniels v. Gowey*..... 412
7. *Departure—New Matter in Reply.* New matter, not inconsistent with the complaint, constituting a defense to new matter set forth in the answer, may be alleged in the reply, without being open to the objection of being a departure from the cause stated in the complaint.—*McCorkle v. Mallory*..... 632

See APPEAL, 27; CARRIERS, 2; GARNISHMENT, 2; INJUNCTION, 2; INTERPLEADER; JURISDICTION; LACHES; LANDLORD AND TENANT, 1; MUNICIPAL CORPORATIONS, 11; NEGLIGENCE, 8; RESCISSION, 4; TRESPASS, 2, 3.

PRINCIPAL AND AGENT.

- Nonfeasance of Agent—Liability to Third Person.* An agent who is put in charge of property by the owner, with sole and absolute control and management thereof, and full power to rent, repair, and keep the same in safe condition for tenants, is liable for injuries resulting because of a failure to keep such premises in repair; there being no distinction, as regards an agent's liability, whether the injuries flow from his nonfeasance or misfeasance.—*Lough v. John Davis & Co.*..... 204

See TROVER AND CONVERSION.

PRINCIPAL AND SURETY. See APPEAL, 21; CONTRACTS, 5.

PROHIBITION, WRIT OF.

1. *Grounds for—Erroneous Exercise of Jurisdiction.* Prohibition will not lie to restrain the superior court from passing upon questions raised by demurrer, when it has jurisdiction, even if such jurisdiction is erroneously exercised; and the fact that no remedy is afforded by appeal or certiorari for the review of such erroneous action would not alter the rule.—*State ex rel. Foster v. Superior Court*..... 156
2. *Remedy by Appeal.* There being a remedy by appeal from the judgment of the superior court in regard to the distribution of a decedent's estate, the court will not be restrained by writ of prohibition from proceeding in the

PROHIBITION, WRIT OF—CONTINUED.

- matter, although it may be acting without jurisdiction.
—*State ex rel. Carrav v. Superior Court*..... 700
3. *Same—Adequacy of Remedy.* The adequacy of the remedy by appeal is not affected by the expense thereof, nor by the delays and annoyances incident to an appeal.—*Id.* 700
4. *Remedy by Appeal.* The writ of prohibition will not issue to restrain the superior court from entertaining an appeal from the order of a board of county commissioners establishing a county road, since there is an adequate remedy by appeal from the judgment of the superior court.—*State ex rel. Zent v. Superior Court*.... 702

See APPEAL, 16.

PUBLIC LANDS. See TIDE LANDS.

RAPE.

1. *Sufficiency of Evidence—Corroboration.* In a prosecution for rape committed by a father upon his daughter, the evidence was sufficient to sustain a conviction, although the only evidence of the commission of the act was that of the daughter, which was contradicted by that of the father, where the daughter's testimony was corroborated by the fact of her father's flight when charged with his improper relations, and by a letter from him to his son, after arrest, endeavoring to get the latter to have the daughter not testify against him, so that he might get out of the scrape.—*State v. Roller*..... 692
2. *Corroboration of Prosecuting Witness.* In the absence of statute requiring it, it is not necessary that the prosecuting witness be corroborated upon a prosecution for rape.—*Id.*..... 692
3. *Elements of Crime When Child Under Age of Consent.* Under Bal. Code, § 7062, which defines carnal intercourse with any female child under the age of eighteen years as rape, the act is a crime whether or not force is used, and the fact that the prosecuting witness testified in the trial that the defendant used force, while the information charged that defendant did "feloniously carnally know and abuse" the prosecutrix, would not support the

RAPE—CONTINUED.

objection that the defendant was extradited for one crime and tried for another.—*Id.* 692

RECEIVERS. See **APPEAL**, 20; **CONTEMPT**; **INSOLVENCY**.

REFORMATION OF INSTRUMENTS. See **RESCSSION**, 1.

REMOVAL OF CAUSES.

Seasonableness of Application. Where the resident defendants to an action are dismissed from the case, only at the close of the introduction of testimony and in opposition to plaintiff's contention, an application at that time by the remaining non-resident defendant for removal of the cause to the federal court is not seasonably made.—*Howe v. Northern Pacific Ry. Co.* 569

RESCSSION.

1. *Reformation of Deed—Land Included Under Two Contracts—Mutual Mistake.* Plaintiff's assignor had purchased a strip of land twenty feet wide off the east side of the land of defendant under a contract of sale, which was assigned to plaintiff, who contracted with defendant for ten feet additional, and a deed was executed conveying a tract described by metes and bounds, which was 30 feet wide on the street and 16.8 feet wide at the rear end of the lot, instead of being a thirty foot strip of land, as the parties had contemplated. The mistake arose from the fact that the lot lines were supposed to run at right angles, while in fact the side lines paralleled one of the streets which was at an angle of 95° 56' with the other. There was no misunderstanding between the parties as to the twenty-foot strip, but the conveyance of an additional ten-foot strip off the east side would have included a portion of defendant's buildings and fruit and ornamental trees, which was not within the contemplation of either of the parties. Plaintiff brought an action to enforce the deed, so as to make it include a thirty-foot strip, and defendant asked for a rescission of the whole contract.

Held, that plaintiff was entitled to reformation of the deed so as to properly describe and include the twenty-foot strip covered by the first contract, and defendant

RESCISSON—CONTINUED.

- was entitled to a rescission of the second contract on the ground of mutual mistake.—*Lord v. Horr*..... 477
2. *Same—Right to Relief.* The fact that a party asks for rescission as to two tracts of land sold under separate contracts, but included in the deed as an entirety, would not deprive her of the right to rescind as to that portion of the contract for which she was entitled to relief.—*Id.* 477
3. *Same—Tender—Objections Not Urged Below.* Failure to tender purchase money when asking for rescission of a deed upon which it was paid would not preclude the defendant from relief, when issue was taken upon her answer without objection because of such failure, and she had not been placed in default during trial for failure to bring the money into court.—*Id.*..... 477
4. *Same—Pleading—Inconsistent Defenses.* In an action for a reformation of a deed, an answer setting up that the deed expressed the contract of the parties, but that, if it did not, there was such a mutual mistake as would authorize a rescission, does not fall within the rule forbidding inconsistent defenses.—*Id.*..... 477

SALES.

1. *Executory Agreement.* Payment of purchase money to bind a bargain of sale constitutes merely an executory contract, which does not ripen into a valid sale until the payment of the balance on or before the time stipulated in the contract.—*Robinson v. Thoma*..... 129
2. *Same—Action to Recover Goods—Absence of Demand and Tender.* A directed verdict in defendant's favor was warranted in an action to recover a quantity of hay under a contract which recited: "Received from W. W. Robinson ten dollars, on acct. of 100 tons hay, more or less, at \$5.50. Hay to be moved by the last of July," where the evidence showed that the price was not tendered nor demand for the hay made until a week later than the stipulated time.—*Id.*..... 129
3. *Time for Performance of Contract—Extension—Evidence.* In an action for the price of goods shipped by plaintiff to defendant, in which the plaintiff sought to establish a waiver of an agreement for liquidated dam-

SALES—CONTINUED.

ages for any delay in shipment, evidence that a stockholder of defendant, who was temporarily in plaintiff's city on other business, had expressly agreed to an extension of time for shipment is admissible, when letters of defendant, though subsequent in date to the alleged agreement for extension, carry the inference that such stockholder was defendant's authorized agent for the purpose.—*American Copper, Brass & Iron Works v. Galand-Burke B. & M. Co.*..... 178

See CONSTITUTIONAL LAW, 4-6; GARNISHMENT, 2.

SHERIFFS AND CONSTABLES. See GARNISHMENT, 1.

SPECIFIC PERFORMANCE.

1. *Unperformed Conditions.* Specific performance of a contract will be enforced where any of its conditions remain unperformed on the part of the one asking enforcement.—*Jordan v. Coulter*..... 116
2. *Enforcement of Purchase Price by Vendor.* Specific performance of a contract for the sale of land is enforceable against the vendee by suit in equity for enforcement of the purchase price by collection of the money from any of defendant's property, or by order of sale as upon execution.—*Anderson v. Wallace Lumber & Mfg. Co.*..... 147
3. *Sale of Land for Right of Way—Construction of Contract.* An agreement by plaintiff in consideration of the sum of \$200, the receipt of \$160 of which is acknowledged, to convey defendant a right of way across his lands according to a certain line of survey; that defendant should have the right to enter upon the lands for the purpose of constructing a ditch along the proposed right of way, across which defendant agreed to construct a bridge at a point to be designated by plaintiff; and that, in consideration of the premises, the plaintiff agreed to execute a good and sufficient conveyance, on or before one year from date, upon the payment of the balance of \$40 in cash, is not an option, but a mutual contract of sale of land, enforceable by defendant after the lapse of the year, inasmuch as time is not made of the essence of the contract, and for the reason that delay in payment of an inconsequential portion of the purchase price

SPECIFIC PERFORMANCE—CONTINUED.

would not be sufficient of itself to justify forfeiture.—
Roberts v. White River Water Power Co. 430

See VENDOR AND PURCHASER.

STATES AND STATE OFFICERS. See MANDAMUS, 1.

STATUTES.

Determination of Validity. The validity of a statute will not be determined, except when necessarily involved in the case before the court.—*Sayles v. Walla Walla County.* 194

See GARNISHMENT, 1; MUNICIPAL CORPORATIONS, 6, 7.

STREET RAILWAYS.

1. *Collision With Team—Dangerous Rate of Speed—Evidence.* In an action against an electric street car company to recover for injuries resulting from a collision with plaintiff's team, occasioned because of the operation of a car at a high rate of speed, evidence showing that the customary rate of speed of cars on the line was in excess of the limit prescribed by ordinance is irrelevant (*Christensen v. Union Trunk Line*, 6 Wash. 75, followed).—*Atherton v. Tacoma Ry. & Power Co.* 395
2. *Same—Instructions.* An instruction, in effect, that no recovery could be had on account of a collision with an electric car, if the speed of the car was within the limit prescribed by ordinance and if the bells were rung, is erroneous, since negligence in the rate of running the car must be determined from all the surrounding circumstances.—*Id.* 395
3. *Negligent Construction of Tracks—Personal Injuries—Instructions.* In an action against a street railway company to recover for injuries resulting from plaintiff's buggy upsetting by reason of the wheels striking against the rails of the company's track, which had not been planked flush with the street as required by ordinance, an instruction that the company would be liable because of such failure to comply with the ordinance was not misleading because it added, "unless you should further find from the evidence that some sufficiently efficacious

STREET RAILWAYS—CONTINUED.

- method be applied to keep the streets in safe condition for public travel"; there being evidence that the street had been rendered equally safe by substituting gravel for planks.—*Gray v. Washington Water Power Co.*..... 665
4. *Same.* An instruction that if the jury believe that the failure of defendant to plank its rails, as required by ordinance, at the point where plaintiff was injured constituted an obstruction to public travel, and plaintiff was injured by being thrown from her buggy because of such dangerous condition of the track, defendant was liable, was not erroneous as charging the absolute liability of defendant for failure to plank its rails so as to make them flush with the street, especially where the court further charged that if the jury found that if defendant protected its rails by some other method than planking, so as not to endanger the traveling public, the jury need not consider the requirements of the ordinance in determining the question of defendant's negligence.—*Id.* 665

SUBROGATION.

- Right to—Payment of Taxes by Mortgagee.* Where one in good faith, in the belief that he has a valid lien on certain personal property, pays delinquent taxes thereon in order to protect his supposed lien, he is entitled to be subrogated to the rights of the county to the extent of the taxes paid, with interest thereon at the legal rate, but is not entitled to collect the penalties provided by statute.—*Dunsmuir v. Pt. Angeles, etc., Power Co.*..... 586

See JUDGMENT, 4.

TAXATION.

- Delinquent Tax Sale—Right of Redemption.* A county treasurer is warranted in refusing to execute a conveyance to the purchaser at a delinquent tax sale, although the latter has tendered all the taxes due and is fully entitled to a deed, if before conveyance full redemption is made by the owner, since the statute governing tax sales permits redemption therefrom at any time before the execution of the deed.—*State ex rel. Race v. Cranney*.... 594

TAXATION—CONTINUED.

See CONSTITUTIONAL LAW, 1-3; JUDGMENT, 4; MANDAMUS, 2; SUBROGATION.

TENDER.

Tender of Price—Deposit of Money in Bank. The deposit of money in bank to the credit of the adverse party, and notifying him thereof, does not constitute a sufficient tender in law.—*Robinson v. Thoma*..... 129

TIDE LANDS. See MANDAMUS, 1.

TRESPASS.

1. *Injunction Again Trespass—Right to Jury Trial.* An action to restrain the continuance of a trespass, to recover damages therefor, and to remove a cloud from title to real estate, being one of equitable cognizance, a jury is not demandable as a matter of right.—*Maggs v. Morgan*. 604
2. *Same—Actual Possession—Pleading.* Residence upon land is unnecessary in order to establish actual possession; and actual possession is sufficiently set forth where the complaint alleges that "plaintiff is now and for more than fifteen years next prior to the date of this complaint his been, the owner in fee simple absolute and in the actual, notorious and open possession" of the lands in controversy.—*Id.* 604
3. *Same—Description of Lands.* In an action to restrain trespass and quiet title to certain lands, the description of the lands in the complaint is sufficiently definite when it shows where the land is located and is sufficient to enable the boundaries to be readily traced on the ground.—*Id.* 604

See WATERS AND WATERCOURSES.

TRIAL.

1. *Instructions—Construction as a Whole.* Although an isolated portion of an instruction standing alone may be technically erroneous, yet it will be upheld, if the whole instruction, taken together, fairly states the law.—*Roberts v. Port Blakely Mill Co.*..... 25

TRIAL—CONTINUED.

2. *Same—Refusal of Requests.* The refusal of the court to give a requested instruction concerning circumstantial evidence was not error, where there was some circumstantial evidence introduced, but the case did not rest upon that character of proof.—*Id.* 25
3. *Same.* The refusal of requested instructions is not error, when those given cover the same ground.—*Id.* 25
4. *Challenge to Evidence—Effect of Denial.* The overruling of defendant's challenge to the sufficiency of the evidence does not entitle plaintiff to judgment, under the practice in this state.—*Browder v. Phinney* 74
5. *Wrongful Exclusion of Evidence—How Cured.* Error cannot be predicated upon the exclusion of testimony, where the excluded matter is subsequently permitted to be put in evidence.—*Jordan v. Seattle* 298
6. *Exclusion of Evidence—Harmless Error.* The exclusion of testimony as to what would be a reasonable fee for curing plaintiff's injuries was not prejudicial error, where no doctor's fees were claimed by plaintiff and none were incorporated in the judgment.—*Id.* 298
7. *Findings of Fact—Equitable Actions.* The statute requiring the court to file findings of fact is inapplicable to actions of equitable cognizance.—*White Crest Canning Co. v. Sims* 374
8. *Signing Judgment—Notice.* The trial court may properly sign its judgment on the day of rendition, without any necessity of notice thereof being given to the losing party.—*Id.* 374
9. *Instructions—Exceptions.* Where the court had charged the jury that "unless the plaintiffs have established to your satisfaction by a preponderance of the evidence that there was a substantial failure on the part of defendant to comply with his contract, your verdict must be for defendant," an exception thereto which recites that plaintiffs except to "that part of the instructions wherein the judge says that if the defendant has substantially performed his agreement," etc., was not properly taken, since it attributes to the court language not used by it

TRIAL—CONTINUED.

- and which conveys a different meaning than that employed.—*Anderson v. Harper*..... 378
10. *Reopening Case for Introduction of Testimony.* The reopening of a case to allow the contestant of a will to introduce in evidence another will making her a residuary legatee, although the petition contesting the will did not show upon its face any interest of the petitioner in the property of deceased, was not prejudicial to the adverse party, where the will was already on file in the case and the evidence could have been no surprise to him.—*Richardson v. Moore*..... 406
11. *Instructions—Construction as a Whole.* A detached portion of an instruction will not be held as erroneous, where its meaning, when taken in connection with the balance of the instruction, is clearly shown to be unobjectionable.—*Bell v. Spokane*..... 508
12. *Instructions—Burden of Proof.* An instruction to the effect that, if the facts raised a presumption of negligence on the part of defendant, who had set up an affirmative defense of the exercise of due care, then the burden of removing the presumption was on defendant, and the jury should find for plaintiff, if the evidence should be evenly balanced, was correct.—*Foster v. Pacific Clipper Line*..... 515
13. *Same—Refusal of Requests.* The refusal of requested instructions is not error when the same ground has been covered by the court in other instructions.—*Id.*..... 515
14. *Instructions—Comment on Evidence.* When references to the evidence, made by the court in its charge to the jury, do not amount to an explanation or criticism of the evidence, nor assume that a particular fact is proven thereby, such references do not violate the constitutional prohibition against judges commenting upon matters of fact.—*Drumheller v. American Surety Co.*..... 530
15. *Same.* Where there is no evidence as to particular matter, it is not a comment on the facts for the court to tell the jury that "the testimony is silent as to that point." —*Id.*
- 530

TRIAL—CONTINUED.

16. *Notice of Issue—Necessity on Retrial After Appeal.* Under Bal. Code, § 4970, which provides that "when a cause has once been placed upon either docket of the court, if not tried or argued at the time for which notice was given, it need not be noticed for a subsequent session or day," it is unnecessary to give notice of the trial of a cause which had been reversed on appeal and remanded to the lower court for a new trial.—*Spokane, etc., Copper Co. v. Colfelt*..... 628
17. *Instructions—To Be Considered as a Whole.* Detached portions of an instruction will not be considered by an appellate court; but all the instructions on the same subject must be construed together, in order to arrive at the intention of the court and the probable understanding of the jury.—*Gray v. Washington Water Power Co.* 665
18. *Same—Conflict.* An instruction that it was the duty of defendant to construct and maintain its tracks in the street in such a way as to be safe for travel by means of any vehicle drawn by the ordinary horse neither implies a requirement of absolute safety, nor it is contradicted by a later instruction that charges the jury that defendant is required to construct and maintain its road in such condition only as is reasonably safe for ordinary and reasonable use.—*Id.* 665

See **APPEAL**, 13; **ASSAULT**; **CARRIERS**, 9; **CRIMINAL LAW**, 1, 3, 4, 12-14; **DISMISSAL AND NONSUIT**; **EJECTMENT**, 1; **EMINENT DOMAIN**, 10, 12-15; **HOMICIDE**, 7; **MASTER AND SERVANT**, 14; **MINES AND MINERALS**, 1-3; **NEGLIGENCE**, 2, 3, 6, 7; **STREET RAILWAYS**, 2-4.

TROVER AND CONVERSION.

Conversion—Custody of Goods—Evidence—Acts of Agent—Liability of Principal. Where the business of acting as custodian of goods attached by sheriff was entirely foreign to the character of business carried on by a corporation, and it had never authorized its agent to act in that capacity, evidence showing conversations between such agent and the sheriff, to the effect that the agent agreed to keep such goods for the sheriff, after the levy thereon while in the company's possession, was

TROVER AND CONVERSION—CONTINUED.

inadmissible in an action against the corporation for the conversion of the goods, since the corporation would not be bound by the acts of the agent beyond the scope of his authority.—*Koyukuk Mining Co. v. Van De Vanter.* 385

See ACTION, 2.

TRUSTS.

1. *Trustees—Discharge—Appointment of Successor.* Where a trustee was appointed in the place and stead of other trustees of an estate, upon the petition of the latter to be discharged, and such substituted trustee accepted the trust and entered upon its active management as sole trustee and continued to so act for more than twenty years, a debtor to the trust estate cannot urge, in an action by such trustee to enforce collection of a debt, that it was merely a co-trustee because of failure of the court appointing it to enter an order discharging the old trustees.—*Fidelity Insurance, etc., Co. v. Nelson*..... 340
2. *Foreign Trustees—Right to Sue in This State.* A trustee charged with the administration of an estate, though appointed by the court of a sister state, may maintain an action in the courts of this state respecting the trust property, when no local creditor is affected.—*Id.*..... 340

See MUNICIPAL CORPORATIONS, 20.

VENDOR AND PURCHASER.

Contract for Sale of Land—Form. A contract for the conveyance of land, in order to be enforceable in equity, need not be executed and acknowledged with all the solemnity of a conveyance, inasmuch as agreements to convey do not come within the terms of Bal. Code, §§ 4517, 4518, which prescribe that all conveyances of real estate and all contracts creating or evidencing any incumbrance thereon shall be by deed, and that such deed shall be signed and acknowledged.—*Anderson v. Wallace Lumber & Mfg. Co.*..... 147

See BOUNDARIES; FRAUDS, STATUTE OF; INJUNCTION, 1; SPECIFIC PERFORMANCE, 2, 3.

VENUE. See DIVORCE, 2.

VERDICT.

Special Verdict—When Construed to Support General Verdict. Where a special verdict is susceptible of two constructions, one of which will support the general verdict and the other will not, such construction should be given as will support the general verdict.—*McCorkle v. Mallory*. 632

See **MUNICIPAL CORPORATIONS**, 5.

WAREHOUSEMEN.

1. *Contract for Storage—Warehouse Receipt—Variation by Parol.* Where a party has entered into an oral contract of storage with a warehouseman, such contract governs, and not the terms set forth in a warehouse receipt subsequently mailed to him and which was retained by him without noticing that it contained provisions differing from that of his oral contract, and parol evidence is admissible to show the real contract.—*Windell v. Readman Warehouse Co.* 469
2. *Same—Statutory Definition of Receipt—Effect on Contracts.* The fact that Bal. Code, § 3590, defines the nature of a warehouse receipt would not preclude parties from making a contract of storage upon such terms and conditions as they choose.—*Id.* 469

See **WHARFINGERS**.

WATERS AND WATERCOURSES.

Surface Water—Diversion Upon Lands of Another. Where surface waters are confined by natural barriers, so that the waters do not run from such confinement naturally, the upper proprietor may not construct a ditch so as to cast such waters upon his neighbor, to the latter's material injury.—*Sullivan v. Johnson*. 72

WHARFINGERS.

Collapse of Wharf—Presumption of Negligence. Where no external violence is shown as the cause of the collapse of a dock and warehouse, a presumption of negligence on the part of the warehouseman is raised.—*Foster v. Pacific Clipper Line*. 515

See **WAREHOUSEMEN**.

WILLS.

1. *Probate—Residence of Testator.* Under Bal. Code, § 6087, which provides that wills may be probated and letters granted in the county of which deceased was a resident or had his place of abode at the time of his death, or in the county in which he may have died, leaving estate therein, and not being a resident of the state, or in the county in which any part of his estate may be, he having died out of the state, and not being a resident thereof, the question of the testator's place of residence is not a jurisdictional fact, and need not be shown in a petition for probate.—*Higgins v. Nethery*... 239
2. *Same—Contest—Burden of Proof.* Although the order of the court admitting a will to probate is not conclusive of the facts necessary to support it, such as the soundness of mind of the testator and his due execution of the will, yet it makes a *prima facie* case upholding the validity of the will, and the burden of proof is upon contestants thereof to establish that the testator did not execute it, or that he was of unsound mind, or under undue influence.—*Id.*..... 239
3. *Same—Mental Capacity—Non-Expert Witnesses.* The opinions of non-expert witnesses as to the mental condition of a testator are admissible, when it appears that they had known him personally for a long period of time, associated with him and conversed with him on many occasions, and were acquainted with his mental condition about the time the will was made.—*Id.*..... 239
4. *Same—Evidence.* Evidence of the mental incapacity of a testator at a time long before his will was made would not establish incompetency, where other evidence shows that he was of sound mind prior to, at the time of, and subsequent to the date of the execution of the will.—*Id.* 239
5. *Testamentary Capacity—Sufficiency of Evidence.* A woman sixty-four years of age became insane and was taken to a hospital in the month of May, and a few days later was removed to her son's home, whence she was removed to an insane asylum about the middle of July of the same year upon a judgment of insanity rendered by the court; in June, while at her son's home, she revoked a former will in which she had disinherited him, and made a new will in his favor; there is some evidence

WILLS—CONTINUED.

that she had lucid intervals before making this last will; after making it she grew gradually worse and in less than four weeks was committed to the asylum. At the time of making the will she was very nervous during the day and restless at night; walked the floor and refused to remain in bed; and had delusions and hallucinations. Her physician, who attended on her at the time, and had known her for the past twelve years, testified that he did not think she was sane enough to make a will.

Held, sufficient to support the finding of the court that the testatrix was of unsound mind at the time of making the last will.—*Richardson v. Moore*..... 406

WITNESSES.

1. *Valuation by Expert—Competency of Witness.* A witness as to the value of a stone quarry and as to how it should be worked was qualified to testify when it was shown that he had owned and operated stone quarries, that he knew the quarry in controversy, had lived in its vicinity for thirteen years, had examined the property with reference to a purchase thereof, and was acquainted with its market value.—*Seattle & Montana Ry. Co. v. Roeder*. 244
2. *Opinion of Experts—Competency of Witness.* The admission of expert testimony is a matter within the discretion of the trial court, upon a showing of competency of the witnesses deemed satisfactory by the court.—*Czarecki v. Seattle & S. F. Ry. & Nav. Co.*..... 288
3. *Examination.* The fact that a witness had stated he could not tell "the amount exactly" of goods lost would not be ground for excluding his answer to the further question, "State the amount as well as you can, to the best of your knowledge," since it was competent for him to estimate the amount to the best of his knowledge.—*Bullock v. White Star Steamship Co.*..... 448
4. *Cross-Examination.* Where a witness has already testified that he told a falsehood prior to trial to the attorney engaged in cross-examining him, it was not error for the court to restrict further cross-examination

WITNESSES—CONTINUED.

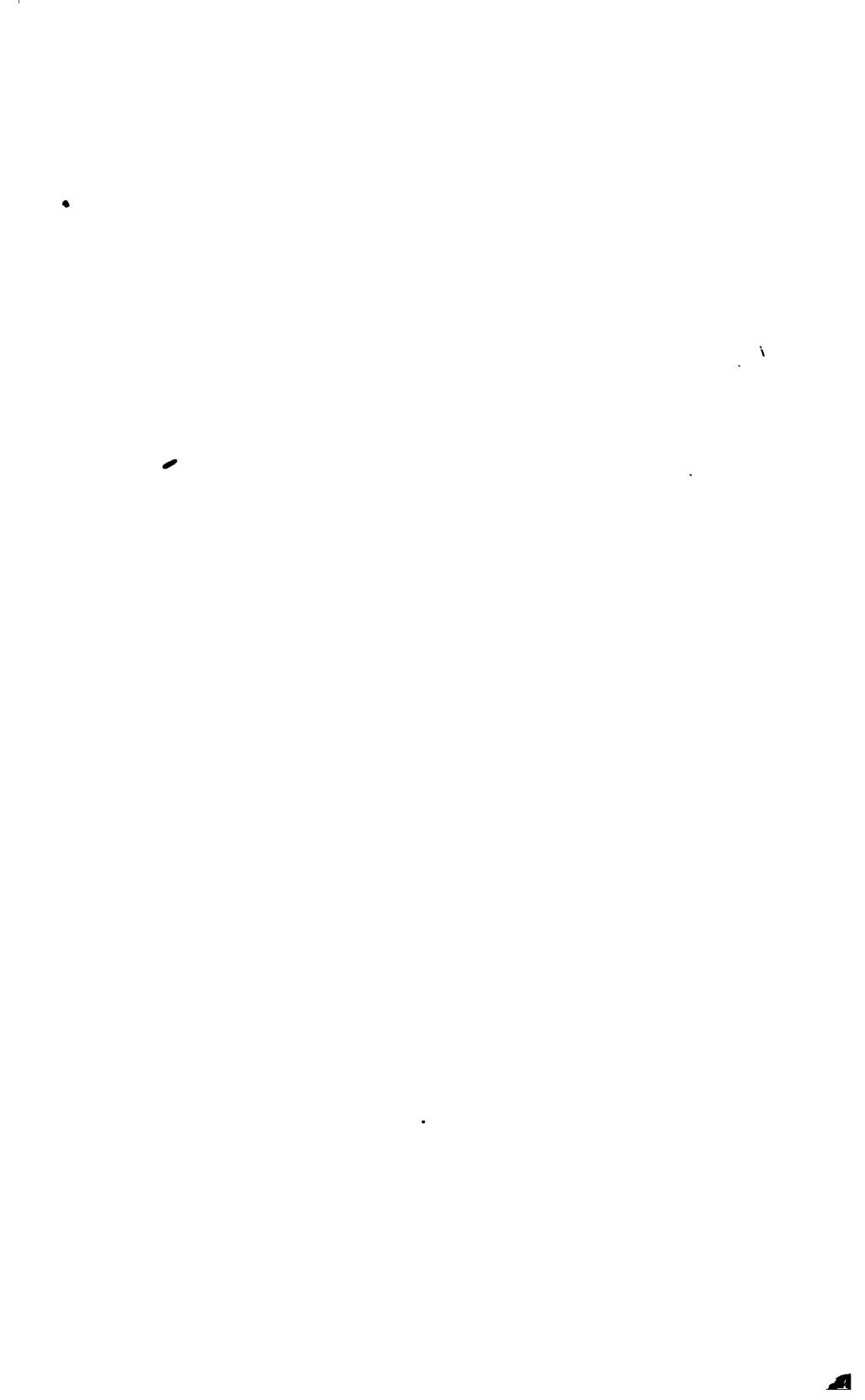
along the same line, especially where the questions call for conclusions which the jury have a right to draw from the whole demeanor and testimony of the witness.
—*State v. Roller*..... 692

5. *Same*. In a prosecution for rape by a father upon his daughter, where defendant's son had shown that he had taken an active part in the prosecution, it was not error to sustain an objection to a question asking the son what he had ever furnished to carry on the defense.—*Id.* 692
6. *Same*. The rejection of testimony would not constitute error, where the witness had already gone over the matter, or was subsequently permitted to answer substantially the same question in another form.—*Id.*..... 692

See DECRET, 4; EJECTMENT, 2; EMINENT DOMAIN, 4, 5;
MASTER AND SERVANT, 4; MUNICIPAL CORPORATIONS,
8; NEW TRIAL, 1; WILLS, 3.

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